(28,381)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 426.

CHAMPLAIN REALTY COMPANY, PETITIONER,

vs.

TOWN OF BRATTLEBORO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1921.

1 STATE OF VERMONT,
Windham County:

To any sheriff or constable in the State, or to —— ——, an indifferent person, Greeting:

By the Authority of the State of Vermont, You are hereby commanded to attach the goods, chattels or estate of the Town of Brattleboro, a municipal corporation, existing under and by virtue of the laws of Vermont, in the County of Windham to the value of $1,000.00 *dollars* and it notify thereof according to law; and appear before the Windham County Court at Newfane within and for the County of Windham and also to notify it to cause its appearance herein, to be entered with the Clerk or said Court, on or before the expiration of forty-two days from the date hereof, then and there in said Court to answer to the Champlain Realty Company, a corporation organized and existing under the laws of the State of New York, with the principal office at Corinth, Saratoga County, State of New York.

2 Also, in a plea of the case, for that the Defendant, at Brattleboro, on the 6th day of October, 1919, was indebted to the Plaintiff in the sum of $700.00 *dollars*, for so much money before that time had and received by the Defendant to the Plaintiff's use; and in the like sum fo- so much money before that time lent and accommodated by the Plaintiff to the Defendant at Defendant's request, and in the like sum before that time paid, laid out and expended by the Plaintiff for the use of the Defendant, and at Defendant's request; and the like sum for certain work, labor, care and diligence of the Plaintiff before that time done and performed and bestowed about the business of the Defendant and for the Defendant at Defendant's request; and for divers materials in and about said work furnished by the plaintiff at the defendant's request, and also in the like sum for divers goods, wares and merchandise of the Plaintiff before that time sold and delivered and bargained and sold to the defendant at defendant's request; and also in the like sum for so much money found due from the defendant to the plaintiff on accounting between them; and also in like sum for the

3 use, rent and occupation of certain premises of the plaintiff; and in consideration thereof the defendant then and there promised the plaintiff to pay to the said plaintiff the said sums on demand; yet, though often requested, the defendant has not paid the same, but neglected and refuse- so to do. All of which is to the damage of the plaintiff (as it says) the sum of 700 dollars, for the recovery of which with just costs, the plaintiff brings suit.

And you are further commanded to summon —— ——, of ——, in the county of ——, Trustee of the said defendant, to appear before said Court at the time and place aforesaid, and make disclosure according to law, of the goods, chattels, rights or credits of the said defendant which the said Trustee may have in his or their or either

of their hands or possession and also notify — to cause — appearance herein to be entered as the law requires.

Fail not, but service and return make within twnety-one days from the date hereof.

Dated at Brattleboro, in the County of Windham the 24th day of November, 1919.

(Signed) F. D. E. STOWE,
Clerk.

M. P. Maurice recognized to the defendant in the sum of Fifty dollars and to each of the above named Trustee- in the sum of fifty dollars, as surety for the costs of prosecution as the law directs.

Before me,

(Signed) F. D. E. STOWE,
Clerk.

4 *Officer's Return on Original Writ.*

STATE OF VERMONT,
Windham County, ss:

At Brattleboro, in said County this 25 day of November, 1919 I served this by attaching *as* the property of the within named defendant The Town of Brattleboro by delivering to Carl S. Hopkins, Clerk of said Town of Brattleboro, a like true and attested copy of said writ with this my return thereon endorsed.

Attest:
F. L. WELLMAN,
Sheriff.

A true copy.

Attest:
—— ——.

Bill of fees:

2 Miles' Travel.....	$.30
1 copies.....	1.50
Securing Property	....
Paid Clerk's Fees	....
	$1.80

5 Windham County Court, April Term, 1919.

CHAMPLAIN REALTY COMPANY
vs.
TOWN OF BRATTLEBORO.

Plaintiff's Specification.

Now comes the plaintiff in the above entitled cause, by Harvey Maurice & Whitney, its attorneys, and specifies and says that th

said defendant is indebted to the said plaintiff for taxes illegally assessed for the year 1919 by the said defendant against the said plaintiff, and paid by the said plaintiff to the said defendant under protest, in manner and form as follows:

For Town Tx. for 1919	$144.00
" " Highway Tax for 1919	60.00
" " School " " "	112.50
Total	$316.50

To Interest may be allowed.

And now comes the plaintiff in the above entitled cause, by Harvey, Maurice & Whitney, its attorneys and specifies and says, that the said defendant is further indebted to the said plaintiff for taxes illegally assessed by said Town of Brattleboro against the said plaintiff and collected by the said defendant, and paid by the said plaintiff to the said defendant under protest, in manner and form as follows:

To State Tax for 1919	$120.00
" " School Tax for 1919	30.00
" " Highway Tax " "	15.00
" County Tax for 1919	3.00
Total	$168.00

To Interest may be allowed.

CHAMPLAIN REALTY COMPANY,
By HARVEY, MAURICE, WHITNEY & FITTS,
Its Attorneys.

6 STATE OF VERMONT,
Windham County, ss:

Windham County Court, April Term, 1920.

CHAMPLAIN REALTY COMPANY
vs.
TOWN OF BRATTLEBORO.

Defendant's Motion for Jury Trial.

Now comes the defendant, in the above-entitled case, and renews its motion heretofore made for a trial by jury, in the above-entitled cause, claiming that it has a right to a jury trial under Article 12 of Chapter 1, of the Vermont Constitution, which is as follows:

"Article 12th. That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred."

It also claims a right to a jury trial under section 30 of Chapter 2 of the Constitution of Vermont, which is as follows:

"Section 30. Trials of issues, proper for the cognizance of a jury, in the Supreme and County Courts, shall be by jury, except where parties otherwise agree; and great care ought to be taken to prevent corruption or partiality in the choice and return, or appointment of Juries."

TOWN OF BRATTLEBORO,
By A. P. CARPENTER.
E. W. GIBSON.

7 Windham County Court, April Term, 1920.

CHAMPLAIN REALTY COMPANY

vs.

TOWN OF BRATTLEBORO.

In the above entitled cause the plaintiff requests the Court to find as follows:

I.

The plaintiff, the Champlain Realty Company, is a corporation organized under the laws of the State of New York, and as such is duly authorized and licensed to do business in the State of Vermont.

II.

During the winter and spring of 1918-1919, the company was engaged in cutting pulp wood in the towns of Jamaica, Winhall, Stratton and Londonderry, in Windham and Bennington Counties.

III.

The wood was cut in four foot lengths and placed upon the banks of the West River and tributaries during the winter and spring, with the intention of floating it down said river and its tributaries and into the Connecticut River, thence to be floated to a mill of the company located at Hinsdale, New Hampshire.

IV.

The West River flows through the towns of Londonderry, Winhall and Jamaica, and then in a southeasterly direction through the town of Brattleboro, all in the State of Vermont, and entering the Connecticut River in said town of Brattleboro. From this point the Connecticut River flows in the State of New Hampshire, past
8 the bolting and rossing mill of the company at Hinsdale, New Hampshire.

V.

The West River has been used for years for the purpose of driving and floating thereon, logs and pulp wood to market.

VI.

Under ordinary conditions of the West River, the spring freshets on that river have subsided before the spring freshet of the Connecticut River has subsided enough to render the latter river drivable and safe on which to hold pulp wood in a boom.

VII.

The company maintained a rossing and bolting mill at Hinsdale, New Hampshire, on the Connecticut River. Here the wood was held in the Connecticut River by means of booms and then taken out and prepared for shipment as pulp wood to the various paper mills of the International Paper Company. In the Connecticut River opposite the mill of the company there was maintained a boom or series of booms to stop and hold such wood as came down the river, which booms were so called single booms, and were the same type of boom as are commonly used in the rivers of that locality.

VIII.

At times of high water in the Connecticut River, with its accompanying swift current, these booms are not capable of holding wood such as the company cut and floated down the river, but such wood will be carried over or drawn under such booms by reason of the high water and swift current and will float down the river and be carried away.

IX.

9 The company maintained a boom at or near the mouth of the West River in Brattleboro, for the purpose of holding wood in the West River until such time as the water of the Connecticut would recede sufficiently to allow wood to be held thereon in a boom.

X.

The company placed all the wood it had cut in the West River Valley into the West River and its tributaries on or before March 25, 1919, at the beginning of the spring freshet.

XI.

The company's intention and plan was to drive the wood down the West River on high water, thence into the Connecticut River and down that river to its mill at Hinsdale.

XII.

Anticipating the probable condition of the Connecticut River at that time, the company placed about the middle of March, 1919, a boom across the West River at or about the point said river empties into the Connecticut River at Brattleboro, for the sole purpose of holding the wood in the West River until such time as the waters of the Connecticut River had receded enough to allow the wood to be held on said river in the company's booms at the Hinsdale mill.

XIII.

The wood was floated down the West River by the high water from the different points up-stream where it had been drawn into the river and the first of this wood reached the boom at the mouth of the West River on March 27, 1919.

XIV.

On March 27, the Connecticut River was high with considerable debris and floating ice running on it and with a swift current.

10

XV.

On that date the Connecticut River was too high and the current was too swift to be drivable and wood of this character could not be held with safety in a boom on that river.

XVI.

The company held the wood coming down the West River on March 27 by those booms at the mouth thereof, and its sole and only reason for so doing was because the Connecticut River was not drivable on that date because of high water and swift current.

XVII.

On March 28, the boom at the mouth of the West River broke, allowing the wood held by it to be let out into the Connecticut River and onto the so-called Retreat meadow, near the mouth of the West River, about one thousand (1,000) cords of which went through the open boom into the Connecticut, of which Fiver Hundred (500) cords were carried over on were drawn under the company's boom at Hinsdale because of high water and swift current and floated away down the river.

XVIII.

On March 29, the company repaired the broken boom, the West River having frozen over since the boom broke. On this day, the Connecticut River was still too high to be drivable.

XIX.

The only purpose of the company in repairing the West River boom was to prevent the wood then at the mouth of the West River from being carried into the Connecticut River before the latter river became drivable and safe to hold logs thereon in a boom.

11 XX.

The West River remained frozen at its mouth from March 29 to April 3, so that the wood at the mouth of that river could not have continued its journey into the Connecticut River.

XXI.

Between March 29 and April 3, the Connecticut Rvier was too high and current was too swift to be drivable or to allow logs to be held thereon by a boom.

XXII.

The company severed the boom at the mouth of the West River on April 3 and the wood held back by said boom passed into the Connecticut River and was carried on said River to the mill of the company at Hinsdale, where it was stopped and held by the company's boom at that point.

XXIII.

April 3, 1919, was the first day of that year on which the Connecticut River was drivable and safe to hold wood on in a boom.

XXIV.

The company's drive down the West River and into the Connecticut River to Hinsdale, New Hampshire was in continuous operation from March 25 until May 9, at which date the end of the drive reached the booms in the Connecticut River at the company's mill at Hinsdale. During this drive the company employed adequate facilities and conducted its drive in a proper manner so as to make a continuous and uninterrupted passage.

XXV.

On April 1st, 1919 there was held by the company's boom at the mouth of the West River in Brattleboro, about Fifteen Hundred (1,500) cords of pulp wood, none of which had been cut
12 in the town of Brattleboro, and all of which had been carried down the West River from points up said river and all of which was destined for the company's mill at Hinsdale, New Hampshire, by way of the Connecticut River.

XXVI.

The company was requested to make and file the tax inventory of its property located in Brattleboro aforesaid on April 1st, 1919. Said inventory was duly executed and filed with the proper officials of said town.

XXVII.

Said tax inventory specified that the Champlain Realty Company was the owner of Fifteen Hundred (1,500) cords of pulp wood located in the Town of Brattleboro in the West River and upon its banks, but that said pulp wood was not taxable by the Town of Brattleboro, the same being wood in transit in interstate commerce.

XXVIII.

The listers of the town of Brattleboro sent to the Champlain Realty Company grand list for the year 1919 the aforesaid Fifteen Hundred (1,500) cords of wood and appraised the same at Thirty thousand dollars ($30,000.00). The grand list of the company for 1919, in Brattleboro was Three Hundred Six Dollars ($306.00) of which Six Dollars ($6.00) was for real estate owned by the company. The tax upon this real estate amount- to Fourteen Dollars Sixty-four cents ($14.64) which was paid by the company without protest. A tax of Six Hundred Sixty-four Dollars Fifty cents ($664.50) was assessed upon the pulp wood owned by the company, of which amount Four Hundred Eighty-four Dollars, Fifty cents ($484.50) was for town taxes the balance being for village and school district taxes. This tax was placed in the hands of W. A. Shumway, duly elected and qualified Tax Collector for the town of Brattleboro.

13 XXIX.

On September 4, 1919, W. A. Shumway, as Tax Collector of Brattleboro, forwarded to the company, a tax bill for 1919 and demanded payment of the taxes as appears from the following letter:

"W. A. Shumway,
Collector of Taxes,
12 Crosby Block,
Brattleboro, Vt.

September 4, 1919.

Champlain Realty Company.

GENTLEMEN:

I am enclosing duplicate tax bill for year 1919. The original tax bill was mailed you some time ago.

Payment of the amount of these taxes is hereby demanded and if not made at once, shall be obliged to start action to collect the same. This action will be taken in view of the fact that the last year's taxes still remain unpaid.

Yours truly,

W. A. SHUMWAY,
Tax Coll."

The tax bill was in words and figures as follows:

"M. Champlain Realty Co.:

For State Tax for 1919..... For Town Tax for 1919..... For Highway Tax for 1919..... For State School Tax for 1919..... For State Highway Tax for 1919..... For County Tax for 1919.....	379.44
For Village Tax for 1919.....	62.40
For District School Tax for 1919.....	134.80
For Town School Tax for 1919.....	112.50
For Street Sprinkling Tax.....	.....
	679.14

Collector's Receipt.

M—. Champlain Realty Co.

Brattleboro, Vermont.

Payment is hereby demanded:

Grand List			$306.00
14			
For State Tax for 1919.....	40		
For Town Tax for 1919.....	48		
For Highway Tax for 1919.....	20		
For State School Tax for 1919....	10	124 cents on the Dollar	379.44
For State Highway Tax for 1919..	05		
For County Tax for 1919.....	01		
For Village Tax for 1919.....	40 cents on the Dollar		62.40
For District School Tax for 1919.	80 cents on the Dollar		124.80
For Town School Tax for 1919...	75 cents on the Dollar		112.50
Street Sprinkling Tax			.....
Real Estate		14.64	
Par		664.14	
			$679.14

Paid ——, 191-.

—— ——,
Collector.

2—426

Regular office days, Mondays and Saturdays, from 2 to 5 and 7 to 9 P. M.

W. A. SHUMWAY,
Tax Collector.

Room 12, Crosby Block."

XXX.

On November 24, 1919, the Champlain Realty Company, by Harvey, Maurice & Whitney, its attorneys, paid the tax assessed against the Champlain Realty Company for 1919, under protest, as appears from the following letter:

"Monday, September Fifteen, Nineteen Nineteen.

W. A. Shumway, Tax Collector of the Town of Brattleboro,
Room 12, Crosby Block,
Brattleboro, Vermont.

DEAR SIR:

Your letter of September 4, addressed to the Champlain Realty Company was received by that Company in due course and referred to us as its attorney.

The company notes, and we note, that you demand payment of the 1919 taxes as follows:

For State Tax for 1919.....	
For Town Tax for 1919.....	
For Highway Tax for 1919.....	$379.44
For State School Tax for 1919.....	
For State Highway Tax for 1919.....	
For County Tax for 1919.....	
For Town School Tax for 1919.....	112.50

and that if the same are not paid at once that action will be taken to collect same.

Of the above $7.44 is on account of the real estate of the Company in the town of Brattleboro, and the balance of the moneys claimed to be due are on account of the assessment on pulp wood of the company.

The Champlain Realty Company by us, its attorneys, states, as it stated on its inventory, that the appraisal by the listers of the town of Brattleboro of the pulp wood of the Company in and at the mouth of the West River on the first day of April, 1919, was not taxable by the municipality taxing the same as per your statement, inasmuch as the same was in transit from points outside of the town of Brattleboro viz: the towns of Winhall, Jamaica and Londonderry in the State of Vermont, to a point outside of the State of Vermont, viz: to Hinsdale, County of Cheshire and State of New Hampshire.

Solely because of your letter of September 4th above referred to, wherein you demand payment at once or otherwise action will be

taken to collect the taxes, and protesting that such taxes on such pulp wood are illegal, the Champlain Realty Company herewith, under protest, tenders you the sum of Four Hundred and eighty-four Dollars and fifty cents ($484.50) being the amount of the above taxes on the pulp wood hereinbefore referred to, and this tender is made with reservations of all the Company's rights to contest the validity of the taxes covered by this tender in every particular.

Yours very truly,

CHAMPLAIN REALTY COMPANY,

By —— ——,

Its Attorneys.

J. N. H./H. C. F.

XXXI.

W. A. Shumway, as Tax Collector for the Town of Brattleboro, accepted such payment and gave therefor a receipt for Six Hundred Sixty-four Dollars and Fifty cents ($664.50) of which amount Four Hundred Eighty-four Dollars and Fifty cents ($484.50) was for taxes levied by the town of Brattleboro for the year 1919. This receipt was in form and figures as follows:

"Nov. 24, 1919.

Received of Harvey, Maurice & Whitney Attorneys for Champlain Realty Co., Six Hundred seventy-nine and 14/100 Dollars, Fourteen and 64/100 Tax on real estate paid without protest.

$484.50	Twon Tax paid under protest.
120.00	School Dis. #2 " "
60.00	Village Tax " "
$664.50	paid under protest.
14.64	not " "
$679.14	

W. A. SHUMWAY,
Coll."

16 XXXII.

After said payment on November 24, 1919, the Champlain Realty Company brought the above entitled action in the County Court for the County of Windham and State of Vermont before any part of said taxes were paid by said Town to the County of Windham or State of Vermont the writ in the above entitled cause was served upon the defendant town of Brattleboro by delivery of a copy thereof to the Town Clerk of said town, all as more fully appears from the original writ and officer's return thereon now on file in this Court.

17 STATE OF VERMONT,
Windham County, ss:

No. 2184.

CHAMPLAIN REALTY COMPANY

vs.

TOWN OF BRATTLEBORO.

Defendant's Request for Findings.

The defendant, in the above entitled case, respectfully requests the Court to make the following findings of fact:

1. The wood upon which the tax in question was assessed was the product of the state of Vermont. It was in the town of Brattleboro on the 1st day of April, 1919. On said 1st day of April, it was still held as a part of the general mass of the property of the State. It was taxed without any discrimination in the usual way and manner in which such property is taxed in the State of Vermont.

2. The wood was not started on its final journey out of the State until it left the boom at Brattleboro, which was subsequent to the first day of April, 1919.

3. That the purpose of the boom across the West River at Brattleboro was to create a safe depot "or holding station" where the wood was to be held and was held, until such time as the plaintiff saw fit to start it on its final journey out of the state.

4. That when the wood was started on its final journey out of the state the plaintiff had to open up the boom at Brattleboro and put the wood in motion.

5. That the wood was to be held at the boom in Brattleboro an indefinite time.

18 6. That the wood was cut by the plaintiff on land of the plaintiff, in the valley of the West River and its tributaries all in the State of Vermont, and floated down said tributaries and said West River by the plaintiff to the "holding grounds" created by the boom at the mouth of the West River in the Town of Brattleboro, and there held until such time as the plaintiff saw fit to take it out into the Connecticut River and on to its mill at Hindsale, N. H.

7. That there is no evidence of the West River or its tributaries ever having been used for the *rpu*-pose of transporting merchandise, wood, logs, or other products of the field or forest prior to 1918, and then only by the plaintiff and its predecessor, the American Realty Company.

8. The wood was kept at the "holding grounds," which was the boom at Brattleboro, on account of the profit of the owner to keep it there (until it could be safely floated and boomed in the Connecticut River). There was nothing, so far as shown in this case, preventing selling a part or all of the wood in question to other parties while it was stored and yarded in the boom at Brattleboro.

9. The destination of the wood was not fixed or certain until it left the boom at Brattleboro, but was entirely subject to the will of the Champlain Realty Company.

10. This wood was a part of the general mass of property of the State of Vermont, it was not merely property passing through the state to a destination outside the State.

11. There was no payment of the taxes in question except such as was purported to have been made by the attorneys for the plaintiff delivering to W. A. Shumway, Tax Collector, the check of Harvey, Maurice & Whitney which check was dated Nov. 25, 1919.

19 12. The money received by the Collector, upon the payment of the check by the bank, was not paid over by said Collector to the Town Treasurer of the town of Brattleboro until sometime subsequent to Nov. 28, 1919.

13. The Grand List of the Champlain Realty Company in the town of Brattleboro for the year 1919 was $306.00. This grand list was made up by the assessment upon the pulp-wood in question and upon certain other property of the Champlain Realty Company in the town of Brattleboro.

14. The state tax for 1919, the state highway tax for 1919, and the state school tax for 1919, amounting in all to 55 cents on the dollar of the grand list and the Windham county tax for 1919 of one cent on the dollar is all included in the amount sought to be recovered herein by the apl-intiff.

15. The state tax, the state highway tax, the state school tax and the county tax were all paid by the town of Brattleboro to the several treasuries on or prior to Nov. 1, 1919.

20 Windham County Court, April Term, 1920.

CHAMPLAIN REALTY COMPANY

VS.

TOWN OF BRATTLEBORO.

Defendant's Exceptions.

At the time of filing the "Findings of fact" made by the Court, the defendant takes the following exceptions:

The defendant excepts to the failure and refusal of the Court to find, as requested, in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 15th request- filed on the 21 day of

July, 1920 upon the ground that all of said requests are material and are fully warranted by the evidence in the case, as shown by the transcript and record in the case, to which reference is here made.

The defendant objects and excepts to the following portions of the findings of fact as filed, namely, on page 2 "said West River and tributaries had been used for driving pulp wood to Hinsdale, New Hampshire, theretofore, to wit, in 1917 and 1918." In the second paragraph on page 3 "the purpose was to hold the logs there until the water in the Connecticut had receded sufficiently to hold the wood in the boom at Hinsdale." In the last paragraph on page 3 "it was not held there for any other purpose than as aforesaid." On page 4 "the broken boom was repaired on March 29, for the purpose of holding the wood until the Connecticut became drivable and safe to hold logs in a boom. The Connecticut was then too high to be drivable and continued in that condition until April 3 and on this latter date the plaintiff's agents and workmen cut the boom at the mouth of West River so that the wood could pass into the Connecticut. At the time the boom was repaired the part
21 of West River where the wood laid, back of the boom, called the holding ground, was frozen and the wood could not go out because of the ice in the river. So the wood if not boomed could not have continued on its journey into the Connecticut at that time. The boom at the south of West River was not closed again after April 3. The Connecticut was not suitable for driving and holding pulp wood after this drive began until April 3. Of the 10,000 cords of wood in this drive only about 4,000 cords *was* held up by the West River boom, which is the so-called head of the drive and the balance later went through to Hinsdale without stopping at the West River boom." The third paragraph on page 5 "the plaintiff's said drive of pulp woof down West river to the Connecticut and thence to its rossing plant at Hinsdale was not continuous operation from March 25 until it was completed on May 9, and was conducted properly to make an uninterrupted passage so far as possible." In the first paragraph on page 7 "but as the receipt would not have been given until payment was made, the Court concludes and therefore finds that the date of plaintiff's check is a clerical error and that payment of the tax was prior to November 25." The second paragraph on page 7 "on November 24, 1919 the plaintiff paid the said tax of $484.50 under protest and the town of Brattleboro received the money." The third paragraph on page 7 "The Court finds that at the time suit was instituted the plaintiff had paid said sum of $484.50 and the defendant had received it."

The grounds of the defendant's objections are that said findings are against the evidence and the weight of the evidence and that the last three on page 7, to wit, the findings that "Payment of the tax was prior to November 25" that "on November 24, 1919, the plaintiff paid the said tax of $484.50 under protest and the town of Brattleboro received the money" and "the Court finds that at
22 the time suit was instituted the plaintiff had paid said sum of $484.50 and the defendant had received it" are all questions of law and not of fact.

The defendant further objects to the findings of fact upon the ground that they were found upon evidence to the admission of which the defendant made objection at the time of the trial and reference may be had to the transcript to show the objections here referred to.

The defendant objects and excepts to the neglect and refusal of the Court to comply with the suggestions made by the defendant in its letter of September 4, 1920, filed the — day of September, 1920, insofar as the same were not complied with and particularly the failure of the Court to find and report the "description of the kind of a boom that was built and maintained across the West River at Brattleboro as testified to by George A. Chedel and Mr. Alfred L. Davis"; and "In order to continue the drive the plaintiff had to open up the boom (at the mouth of the West river) and put his wood again in motion" and the failure of the Court to find and report as requested the testimony of W. A. Shumway, Tax Collector for the Town of Brattleboro, on pages 57 and 58 of the transcript.

TOWN OF BRATTLEBORO,
By A. P. CARPENTER,
E. W. GIBSON,
Its Attorneys.

23 Windham County Court, April Term, 1920.

CHAMPLAIN REALTY COMPANY

vs.

TOWN OF BRATTLEBORO.

Findings of Fact.

This is an action of General Assumpsit brought to recover for taxes assessed by defendant against the plaintiff on the grand list of 1919, and which plaintiff paid under protest. The amount so named in specifications is $484.50. Plaintiff filed specifications of its claim and the same are referred to.

The plaintiff is a corporation organized under the law of New York, and is and was at the time of the occurrences hereinafter mentioned duly authorized and licensed to do business in Vermont.

The plaintiff set the case for trial by the Court at said April Term under the rules, but defendant did not set it for trial at all at said term, but did some two or three days after the time for setting causes for trial at said term, had expired, notify plaintiff's counsel that defendant would move on the opening of the term for leave to set the case for trial on the jury list, and it did so move. The grounds of the motion were the same as those later stated in defendant's written motion, namely, the plaintiff's claim of its constitutional right of trial by jury. Its motion was overruled, so the case was never set for trial by jury at said April term of Windham County Court. Exceptions were given the defendant.

Before the case was tried defendant renewed its motion in writing.

"Now comes the defendant, in the above entitled case, and renews its motion heretofore made for a trial by jury, in the above
24 entitled case, claiming that it has a right to a jury trial under article 12 of Chapter 1 of the Vermont Constitution, which is as follows:

Article 12th. That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred."

It also claims a right to a jury trial under Section 30 of Chapter 2 of the Constitution of Vermont, which is as follows:

Section 30. Trials of issues, proper for the cognizance of a Jury, in the Supreme and County Courts, shall be by Jury, except where the parties otherwise agree; and great care ought to be taken to prevent corruption or partiality in the choice and return or appointment of Juries."

This motion was overruled and defendant allowed exceptions.

The reasons given by defendant's counsel for not setting the case for jury trial was that on the night of March 28, 1920, the bridge across the Connecticut river at Brattelboro went out, and on account of defendant's counsel, Mr. Carpenter, being the town agent of the defendant town, thus having extra work on his hands, he forgot to set the case for jury trial, and the time for setting the case for trial by jury expired the next day, March 29, 1920. The notice by defendant to plaintiff that *plaintiff* would move the court to have case put on the jury list was dated April 2, 1920.

During the winter of 1918 and 1919 the plaintiff cut pulp wood in the towns of Jamaica, Stratton and Londonderry, in Windham County, and Winhall, in Bennington County. The wood was cut four *foot* long and was placed upon the banks of West River and its tributaries to be floated down said river and into the Connecticut and thence to its destination at Hinsdale, N. H., about three miles below the town of Brattleboro. Said West River and tributaries had been used for driving pulp wood to Hinsdale, N. H., theretofore to wit, in 1917 and 1918.

The aforesaid West River and its tributaries are all within the State of Vermont, and said West River empties into the Connecticut in the town of Brattleboro and from the point where West
25 River empties into the Connecticut the latter river flows in the State of New Hampshire. At Hinsdale the plaintiff maintains a bolting and rossing mill, and said logs were destined to that mill, and there the wood was held by means of a single log boom, such as is usually used in the construction of booms and at said mill the wood was rossed and bolted.

When the water was high in the Connecticut and the current swift the said boom at Hinsdale would not always hold the wood the plaintiff floated down the river, but the wood would be carried over or

drawn under the booms because of the high water and swift current and carried down the river and lost.

The plaintiff maintains a boom near the mouth of West River and in the town of Brattelboro to hold and control the logs driven down that river when the water was too high to safely turn them into the Connecticut. The purpose was to hold the logs there until the water in the Connecticut had receded sufficiently to hold the wood in the boom at Hinsdale.

The plaintiff put all the pulp wood it had cut in the winter of 1918 and 1919 in the aforesaid towns in the West River Valley, into the West River and its tributaries beginning on March 25, 1919, in all about 10,000 cords, intending as the water was then high to drive it down said West River and thence into the Connecticut River and down that river to its mill at Hinsdale, and in anticipation of the probable high water in the Connecticut River it about the middle of March, 1919, placed its boom across West River near its mouth and in the town of Brattleboro for the purpose of holding the wood in the West River until the water in the Connecticut had receded enough to allow the wood to be held on said river at plaintiff's said mill at Hinsdale. The wood floated down West River on the high water and the first of it reached the boom at the mouth of West
26 River on March 27, 1919, and at that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood flow into the Connecticut, as wood of the character of this wood could not be held by the Hinsdale boom, and therefore the plaintiff held its said wood in the boom at the mouth of said West River in Brattleboro. It was not held there for any other purpose than as aforesaid.

On March 28, 1919, the boom near the mouth of West River broke allowing some of the wood held by it to go into the Connecticut and also onto the Retreat meadow near the mouth of said West River. Because of the set back of water caused by the Vernon dam there was formed on said Retreat meadow near the mouth of said West River and southerly therefrom and outside the current of said West River a pond of considerable dimension into which water filled from a set back from the Connecticut. At the time said boom broke the water in the Connecticut was high, and there was debris and floating ice running on it, and the current was so swift that it was not drivable and wood of the character of plaintiffs could not be safely held at Hinsdale. At the time the boom broke as aforesaid there was (the amount as estimated by plaintiff the night before) 4,000 cords of wood held at the boom at the mouth of West River and because of the broken boom 2,000 cords (estimated) went into the Connecticut. 1,500 cords of this wood was held by the boom at Hinsdale and 500 cords went over and under that boom but was saved, a part of it at the Vernon dam and part of it at Turners Falls, Mass., and was hauled back to Hinsdale. The broken boom was repaired March 29, for the purpose of holding the wood until the Connecticut became

drivable and safe to hold logs in a boom. The Connecticut
27 was then too high to be drivable, and continued in that condition until April 3 and on this latter date the plaintiff's agents and workmen cut the boom at the mouth of West River so that the wood could pass into the Connecticut. At the time the boom was repaired the part of West River where the wood laid, back of the boom, called the holding ground was frozen and the wood could not go out because of the ice in the river. So the wood if not boomed could not have continued on its journey into the Connecticut at that time. The boom at the mouth of West River was not closed again after April 3. The Connecticut was not suitable for driving and holding pulp wood after this drive began until April 3. Of the 10,000 cords of wood in this drive only about 4,000 cords was held by the West River boom which is the so-called head of the drive and the balance later went through to Hinsdale without stopping at the West River boom.

The morning the boom broke half the wood in the boom or 1,000 cords went into the Retreat meadow and it is an estimate that there were 2,000 cords in all in the boom and on the Retreat meadow on April 1 and 6,000 cords held up back on the West River and on its banks above. Some of this wood so strewn along and on the banks of West River was in the town of Brattleboro.

The 1,000 cords on the Retreat medow and some wood lodged on an island remained after the boom was cut. That on the Retreat meadow was taken out by a process called booming or warping about two weeks after it went on there. These logs could not come out unless boomed or warped out.

The plaintiff's said drive of pulp wood down West River to the Connecticut and thence to its rossing plant at Hinsdale was in continuous operation from March 25, until it was completed on May
9, and was conducted properly to make an uninterrupted
28 passage do far as possible.

On April 1, 1919, there was held in the plaintiff's boom at the mouth of West River in the town of Brattleboro about 1,500 cords of the aforesaid pulp wood. None of it was cut in the town of Brattleboro. All of it had been carried down West River from points above the town of Brattleboro and all of it was destined to the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut River.

The plaintiff was requested by the listers of Brattleboro to make and file a tax inventory of its property in Brattleboro on April 1, 1919, and such inventory was executed and filed with the proper officials of said town. Pl't'ff's Exhibit 2. The said tax inventory specified that the Champlain Realty Co. was the owner of 1,500 cords of pulp wood situated in the town of Brattleboro on the West River and its banks but that said pulp wood was not taxable by said town of Brattleboro but was wood in transit in interstate commerce.

The plaintiff had other property set in the Grand List of Brattleboro for 1919, but the fifteen hundred cords of pulp wood, which plaintiff at all times claimed was not taxable was appraised at $30,000.00 and the tax assessed thereon and which plaintiff paid under protest was $484.50.

The aforesaid tax was made up as follows:

Town tax for 1919	$144.00	
Town Highway tax for 1919	60.00	
Town School Tax for 1919	112.50	
Total		$316.50
The state tax on said Grand List for 1919		$120.00
State School tax for 1919		30.00
State Highway tax for 1919		15.00
County Tax for 1919		3.00
Total		168.00

Total of all taxes paid by plaintiff under protest and for which he seeks to recover in this action, $484.50.

The said state, state school, state highway and county taxes
29 were paid by the defendant to the several treasurers out of the general fund on the following dates.

State tax, Nov. 1, 1919.
County tax, Sept. 23, 1919.
State School Tax, Sept. 29, 1919.
State Highway Tax, Sept. 29, 1919.

The plaintiff's check in payment of the tax paid under protest as aforesaid (Pl't'ff's Ex. 8) bears date November 25, 1919. The collector's receipt for taxes paid by the plaintiff to the defendant is dated November 24, 1919. The writ in this case issued November 24, 1919, and was served the next day.

It is urged, by the defendant, that the payment was not made until after suit was brought, but, as the receipt would not have been given until payment was made, the court conclude- and therefore finds that the date of plaintiff's check is a clerical error and that payment of the tax was prior to Nov. 25. The check (Ex. 8) was paid at the bank on which it was drawn Nov. 28, 1919, and the lat-er paid to the Town Treasurer.

On November 24, 1919, the plaintiff paid the said tax of $484.50 under protest and the town of Brattleboro received the money.

The court finds that at the time suit was instituted the plaintiff had paid said sum of $484.50 and the defendant had received it.

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are herewith made a part of these findings. Plaintiff's Ex. 3 is the Grand List book of defendant town for 1919 and plaintiff's Ex. 4 is defendant's tax bill or tax book for 1919. Neither 3 nor 4 were taken with the other exhibits by the court but were left with town officials.

Judgment to be for plaintiff to recover $484.50 and interest
30 thereon from Nov. 24, 1919, to Sept. 12, 1920. Computed at $23.25.

(Signed) ZED S. STANTON,
ALBERT B. WAITE,
TYLER D. GOODELL,
Judges Windham County Court.

31 *Docket Entries.*

1162.

CHAMPLAIN REALTY COMPANY

v.

TOWN OF BRATTLEBORO.

(Contract.)

H. M. W. & F.
Carpenter.

Nov. 24, 1919, date of writ; Nov. 29, ent. dkt. & spec'n. fi; May 7, 1920, mo. by deft. to set cause on jury list; July 2, mo. for jury trial fi.—over'd; pltf's req. for finds. fi; July 21 defts. req. for finds. & defts. brief fi; Sept. 6, deft. add'l. req. for finds. fi; Sept. 22, find. of fact fi; judg't; judg't. for pltff; $507.75 & costs; exc. by def't; deft's. obj'ns. & exc. to judg't fi; deft's req. for trans. fi; trans. ord. of reporter; deft's. exc. to find. of fact fi; Oct. 11, deft's exc. fi.—Sp. Feb. T. at Brat. 1921; heard & with Ct. Taylor, J.

May T. 1921; Judg. reversed. Judgment for defendant to recover its costs. Certification of judgment stayed for a period of 60 days from and after rising of court.

32 STATE OF VERMONT,
Washington County, ss:

I, Lewis C. Moody, Clerk of the Supreme Court of the State of Vermont (General Term) which is a Court of Record, having a seal as hereto attached, do hereby certify that the foregoing are true copies of the original writ; plaintiff's specifications; defendant's motion for jury trial; plaintiff's request for findings; defendant's request for findings; findings of fact; defendant's exceptions and docket entries in a cause entitled Champlain Realty Company v. Town of Brattleboro by said Court heard and determined at a term thereof begun and held at Montpelier, in the County of Washington and State of Vermont, on the first Tuesday in May, A. D. 1921, as appears by the said original record now remaining in the office of the Clerk of said Court, by me this day examined and herewith compared.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Montpelier, in the County of Washington, this 28th day of May, A. D. 1921.

[Seal of State of Vermont Supreme Court.]

LEWIS C. MOODY,
Clerk.

33 Harvey, Maurice & Whitney,

Attorneys at Law.

Brattleboro, Vt., Nov. 25, 1919. No. 936.

Pay to the order of W. A. Shumway, Tax Collector of the Town of Brattleboro, $484.50 Four hundred eighty four dollars fifty cents.

HARVEY, MAURICE & WHITNEY,
By H. C. FENTON.

To The Peoples National Bank, Brattleboro, Vt.
Collectible at Par through the Federal Reserve Bank at Boston.
58-51.
The J. C. Hall Co. Prov. R. I.

NOTE.—This check is perforated through its face with the following: Paid 11 28 19.

Marked on the reverse side for identification: 2184. Plaintiff's Ex. 8. N. D. C.

Reverse side also has the following endorsement: Pay to Peoples Natl. Bank, Brattleboro, or order W. A. Shumway, Collector.

34 State of Vermont.

Office of Secretary of State.

I hereby certify that the Champlain Realty Company a corporation organized under the laws of New York having its principal place of business within this State at White River Junction and engaged in the business of dealing in woodlands and other real estate and in lumber, timber, pulpwood and other products of said real estate and other business as provided for in the certificate of incorporation has complied with all the requirements of law and is authorized to do business in this State.

I further certify that the business to be carried on by such corporation in this State is not repugnant to the laws of Vermont.

Dated at Montpelier, Vt., this thirty first day of August 1907.

[SEAL.] FREDERICK G. FLEETWOOD,
Secretary of State.

35 State of Vermont.

[State of Vermont Seal.]

Office of Secretary of State.

I hereby certify that the foregoing is a true copy of "Certificate of Admission of the Champlain Realty Company August 31, 1907" as appears from the files and records of this office.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Montpelier, this twenty-eighth day of June, A. D. 1920.

[SEAL.] (Signed) HARRY A. BLACK,
Secretary of State.

NOTE.—This is marked for identification as: 2184. Plaintiff's Ex. 1. N. D. C.

36 State of Vermont.

[Seal of Vermont.]

Office of Commissioner of Foreign Corporations.

I hereby certify that Champlain Realty Company a corporation organized under the laws of New York and having its principal place of business within this State at —— is hereby authorized to transact such business in this State as was specified in the *ogiainl* certificate of authority issued to said corporation August 31, 1907. This certificate in extension of authority shall continue in force until April 1st, A. D. 1917.

Dated at Montpelier, Vt., this thirty-first day of March, A. D. 1916.

GUY W. BAILEY,
Secretary of State,
Commissioner of Foreign Corporations.
CHARLES A. PLUMLEY,
Commissioner of Taxes,
Commissioner of Foreign Corporations.

37 State of Vermont.

[State Seal.]

Office of Commissioner of Foreign Corporations.

I hereby certify that Champlain Realty Company a corporation organized under the laws of New York and having its principal place of business within this State at Rochester is hereby authorized to transact such business in this State as was specified in the original certificate of authority issued to said corporation August 31, 1907. This certificate in extension of authority shall continue in force until April 1st, A. D. 1918.

Dated at Montpelier, Vt., this second day of April, 1917.

GUY W. BAILEY,
Secretary of State,
Commissioner of Foreign Corporations.

38 State of Vermont.

[State Seal.]

Office of Comissioner of Foreign Corporations.

A certificate in extension of authority is hereby granted to The Champlain Realty Company a corporation organized under the laws of New York and having its principal place of business within this State at White River Junction, to engage in the business of Forest operations for the production of lumber and pulp wood.

This certificate in extension of authority shall continue in force until April 1st, A. D. 1920.

Dated at Montpelier, Vt., this first day of April, 1919.

HARRY A. BLACK,
Secretary of State,
Commissioner of Foreign Corporations.

39 State of Vermont.

[State Seal.]

Office of Commissioner of Foreign Corporations.

A certificate in extension of authority is hereby granted to Champlain Realty Company a corporation organized under the laws of New York and having its principal place of business within this State at —— to engage in the business of: Purchasing, cutting, hauling, booming and selling logs, lumber and pulpwood and all things incidental thereto and not contrary to the laws of Vermont;

This certificate in extension of authority shall continue in force until April 1st, A. D. 1919.

Dated at Montpelier, Vt., this sixth day of May, 1918.

FREDERICK G. FLEETWOOD,
Secretary of State,
Commissioner of Foreign Corporations.

40 State of Vermont.

[State Seal.]

Office of the Commissioner of Foreign Corporations.

A certificate in extension of authority is hereby granted to the Champlain Realty Company, a corporation organized under the laws of New York and having its principal place of business within this State at White River Junction, to engage in the business of: Forest operations for the production of lumber and pulpwood.

This certificate in extension of authority shall continue in force until April 1st A. D. 1921.

Dated at Montpelier, Vt., this first day of April, 1920.

HARRY A. BLACK,
Secretary of State,
Commissioner of Foreign Corporations.

41 State of Vermont.

[State Seal.]

Office of Secretary of State.

I hereby certify that the foregoing is a true copy of "Certificates in extension of the Champlain Realty Company issued March 31, 1916—April 2, 1917—May 6, 1918—April 1, 1919 and April 1, 1920 respectively," as appears from the files and records of this office.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Montpelier, this second day of July, A. D. 1920.

[SEAL.] RAWSON C. MYRICK,
Deputy Secretary of State.

42 Nov. 24, 1919.

Received of Harvey, Maurice & Whitney, Attorneys for Champlain Realty Co., six hundred seventy nine and 14/100 dollars, fourteen and 64/100 Tax on real estate paid without protest.

$484.50	Town Tax	paid under protest.
120.00	School Dis. #2	" "
60.00	Village Tax	" "
$664.50		paid under protest.
14.64		not " "
$679.14		

(Signed) W. A. SHUMWAY,
Coll.

Marked on reverse side for identification: 2184. Plaintiff's Ex. 9. N. D. C.

43 PLAINTIFF'S EX. 5. N. D. C.

2184.

W. A. Shumway,
Collector of Taxes,
12 Crosby Block,
Brattleboro, Vt.

September 4, 1919.

Champlain Realty Company.

GENTLEMEN:

I am enclosing duplicate tax bill for year 1919. The original tax bill was mailed you sometime ago.

Payment of the amount of these taxes is hereby demanded and if not made at once, shall be obliged to start action to collect the same. This action will be taken in view of the fact that the last year's taxes still remain unpaid.

Yours truly,

W. A. SHUMWAY,
Tax Coll

44 *M* Champlain Realty Co.:

For State Tax for 1919	
For Town Tax for 1919	
For Highway Tax for 1919	379.44
For State School Tax for 1919	
For State Highway Tax for 1919	
For County Tax for 1919	
For Village Tax for 1919	62.40
For District School Tax for 1919	124.80
For Town School Tax for 1919	112.50
For Sprinkling Tax	.....
	679.14

Paid ——, 191-.

Collector's Receipt.

Brattleboro, Vermont.

M. Champlain Realty Co.:

Payment is hereby demanded.

Grand List			$30,600
For State Tax for 1919	40		
For Town Tax for 1919	48		
For Highway Tax for 1919	20	124 cents on	
For State School Tax 1919	10	the Dollar...	$379.44
For State Highway Tax 1919	05		
For County Tax for 1919	01		
For Village Tax for 1919 40 cents on the Dollar			62.40
For District School Tax for 1919 80 cents on the Dollar			124.80
For Town School Tax for 1919 75 cents on the Dollar			112.50
Street Sprinkling Tax			.....
			679.14

Real Estate	14.64	
Per	664.50	
	679.14	

Paid ——, 191-.

——— ———,
Collector.

Regular Office Days, Mondays and Saturdays, from 2 to 5 and 7 to 9 p. m.

W. A. SHUMWAY,
Tax Collector.

Room 12, Crosby Block.

45 PLAINTIFF'S EX. 7. N. D. C.

2184.

Monday, November Twenty-four, Nineteen Nineteen.

W. A. Shumway, Tax Collector of the Town of Brattleboro,
Room 12, Crosby Block,
Brattleboro,
Vermont.

DEAR SIR:

Your letter of September 4th addressed to the Champlain Realty Company was received by that Company in due course and referred to us as its attorneys.

The Company notes, and we note, that you demand payment of the 1919 taxes as follows:

For State Tax for 1919	
For Town Tax for 1919	
For Highway Tax for 1919	379.44
For State School Tax for 1919	
For State Highway Tax for 1919	
For County Tax for 1919	
For Town School Tax for 1919	112.50

and that if same are not paid at once that action will be taken to collect same.

Of the above $7.44 is on account of the real estate of the Company in the town of Brattleboro and the balance of the moneys claimed to be due are on account of the assessment of pulp wood of the Company.

The Champlain Realty Company, by its attorneys, states, as it stated on its inventory, that the appraisal by the listers of the town of Brattleboro of the pulp wood of the Company in and at the mouth of the West River on the first day of April, 1919 was not taxable by the municipality taxing the same as per your statement, inasmuch as the same was in transit from points outside of the town of Brattleboro, viz: the towns of Winhall, Jamaica and Londonderry in the State of Vermont, to a point outside of the State of Vermont, viz: to Hinsdale, County of Cheshire, and State of New Hampshire:

46 Solely because of your letter of September 4th above referred to, wherein you demand payment at once or otherwise action will be taken to collect the taxes, and protesting that such taxes on such pulpwood are illegal, the Champlain Realty Company herewith, under protest, tenders you the sum of four hundred and eighty-four dollars and fifty cents ($484.50) being the amount of the above taxes on the pulp wood hereinbefore referred to, and this tender is made with reservation of all the Company's rights to contest the validity of the taxes covered by this tender in every particular.

Your very truly,

CHAMPLAIN REALTY COMPANY,

By —— ——,

Its Attorneys.

J. N. H./H. C. F.

47 PLAINTIFF'S EX. 2. N. D. C.

#1 & 2.

2184.

1919 *Tax Inventory of Champlain Realty Co.*

Summary.

Real Estate	$600	
Personal Estate	....	
Net Offsets	....	
Taxable personal estate		.....
Assessment by lister		30,000.00
Total		$30,600
One per cent of total	$306.00	
Poll	.....	
Grand List for Town	$306	
" " " Village	156	
Grand List for Graded School Dist	156	
" " " Town School Dist	150	
" " " Fire Dist.	...	

[Male dogs.]* [Female dogs.]*

NOTE.—Unless otherwise required, all taxpayers must on or before the 20th day of April, 1919 forward or deliver inventory to one or more of the undersigned listers.

ABRAM J. CURRIER,
WALTER L. SYLVESTER,
HENRY E. SHIPMAN,
Listers of the Town of Brattleboro.

Received this 23d day of April, 1919.

H. E. SHIPMAN,
Lister.

—— ——, 1919.

Notice left at last and usual place of abode; or delivered or mailed to —— —— of said corporation.

—— ——,
Lister.

[*Words enclosed in brackets erased in copy.]

48 1919 *Tax Inventory to be Filed with the Listers.*

1. What is the correct name of the person, copartnership, association, corporation, estate, executor, administrator, trustee or guardian, in whose behalf this inventory is made and hereinafter designated as the maker hereof?
Champlain Realty Co.

2. If the maker hereof is a corporation or association, what office therein does the person hold who subscribes and makes oath hereto? (See Sec. 752 G. L.)
Geo. A. Cheadle Superintendent White River Jc.

3. If the maker hereof is a corporation or a non-resident of Vermont, what is the domicile or post office address thereof? (See Sec. 795 G. L.)

4. If the maker hereof is a resident of or domiciled in Vermont, give the name of the town, city, incorporated village, incorporated school or fire district, ward or other municipal division, wherein such maker resided or was domiciled on April 1, 1919; also the street address and number if any of such residence or domicile? (See Sec. 795 G. L.)
—— ——, No. — —— Street, Ward —, Village of ——, Graded School District 1 & 2, Fire District —.

Real Estate.

Lister's valuation.

5. Give a brief description of each separate piece or parcel of real estate located in the town wherein this inventory is to be filed, of which the maker hereof was on April 1, 1919 the last owner or possessor? (See Sec. 795 G. L.)

Toll House & land..... $600.00

6. Since the last quadrennial appraisal, what buildings if any have been erected on said real estate and where are they located? What extensive repairs if any have been made to buildings thereon? (See Sec. 775 G. L.)

7. What buildings or other structures within said town belonging to the maker hereof and standing on "lease land" or on land not owned by such maker were on April 1, 1919 last owned thereby? (See Sec. 680 G. L.)
G. L.)

8. What engines, boilers, electric motors, air compressors, traveling cranes and machinery did the maker hereof own on April 1, 1919 that were so fitted and attached to lands or buildings not owned by such maker as to be a part of a manufacturing or other plant and kept and used as such; and where were the same located? (See Sec. 678 G. L.)

Lister's valuation.

9. What interest (other than perpetual or redeemable leases) in mines or quarries located in such town on land not owned by the maker hereof, and what mining or quarrying rights in such land other than above
49 stated were on April 1, 1919 last owned by such maker? (See Sec. 679, Sec. 681 G. L.)

Total Real Estate..... $.....

Standing Timber.

10. What standing timber within such town, theretofore sold and conveyed to the maker hereof without the land whereon it stands, was on April 1, 1919 last owned by the maker hereof? (See Sec. 718 G. L.)

$.....

Personal Property.

11. What perpetual or redeemable leases upon which rent is reserved (except of lands exempt from taxation) were on April 1, 1919 last owned or held by the maker hereof; and what rental is thus reserved? (See Sec. 681 G. L.)

NOTE.—Such leases must be set in the list as personal property at a sum of which the rent is six per cent.

12. How many cattle, horses, sheep and swine over four months of age and kept within the town wherein this inventory is to be filed were on April 1, 1919 last owned by the maker hereof? See Sec. 684-XI, 703-III, G. L.)

Lister's valuation.		Lister's valuation.	
		Amount Brought Forward	$....
..Cow	$....	..Horse	$....
..Heifer Yearling	$....	..Colt Yearling.....	....
..Heifer 2 years old...	$....	..Colt 2 years old.....	....
..Heifer 3 years old...	$....	..Colt 3 years old.....	....
..Oxen	$....	..Colt 4 years old.....	....
..Steers Yearling....	$....	..Sheep	....
..Steers 2 years old....	$....	..Lambs	....
..Steers 3 years old....	$....	..Hogs	....
..Bull	$....	..Shoats	....
.....	....		
(Other neat cattle) Forward	$....	Total	$....

Lister's valuation.

13. Was the maker hereof on April 1, 1919 the owner of any mules or asses? If so state the kind and number of such animals? (See Sec. 703 G. L.)

14. What animals of the several kinds enumerated in the two preceding questions owned by non-residents of said town, were on April 1, 1919, kept in such town by the maker hereof? State the number and kind thereof and the name and residence of each owner? (See Sec. 703 G. L.)

15. On April 1, 1919 how many and what kind of live fowls were owned by the maker hereof and where were they located?

NOTE.—Only the valuation in excess of twenty dollars will be set in the list.

16. On April 1, 1919 was the maker hereof the owner of any property of the following description. And if so what was the character and location thereof? (See Sec. 684 G. L.)

50 16. *a* Hay or produce other than such as will be required to winter out in 1919 the maker's live stock?

b. Provisions not necessary for family consumption prior to April 1, 1920?

c. Household furniture and furnishings kept and used as such, whose valuation then exceeded $500?

17. On April 1, 1919 what personal property of the several kinds hereinafter enumerated in this question was owned by the maker hereof, and where was the same located? (See Sec. 703 G. L.)

a. Goods, wares, merchandise and stock in trade kept for sale?

b. Machinery for use in manufacturing other than such as is by law required to be set in the list as real estate?

c. Materials for use in manufacturing?

d. Materials for use in any other industrial or mechanical pursuits?

e. Manufactured products in the hands of the manufacturer?

f. Goods, wares, merchandise or commodities in process of manufacture?

Lister's valuation.

g. Unmanufactured products of mines, quarries or other natural deposits?

h. Timber, logs, wood or lumber other than such as are enumerated in the foregoing sub-divisions of this question? 2,000 cords. The wood not taxable as it was en-route to a N. H. point..... $30,000

i. Stock used in the business of the mechanic arts?

j. Raw or other materials not included in the previous answers to this and to the foregoing questions?

18. On April 1, 1919 what office, store, market, shop, bar, or other fixtures, apparatus, applian-es, furniture or furnishings, except stock in trade and such as are shown in answer to the foregoing questions, were owned by the maker hereof; and where were the same then located? (See Sec. 682 G. L.)

19. On April 1, 1919 was the maker hereof the owner or keeper of one or more motor or power boats then in the State of Vermont? If so how many, and in what towns, cities, villages, school or fire districts, were the same kept on that date? (See Sec. 704 G. L.)

20. On April 1, 1919 how many and what chattels of the several kinds next hereinafter enumerated and not included in answer to the preceding questions, were
51 owned by the maker hereof? Watches, pianos, organs, wagons, sleighs, boats other than motor and power, swarms of bees, phonographs, typewriters, adding machines? (See Sec. 684 Subd. XI G. L.)

21. On April 1, 1919, what other taxable personal chattels situated in Vermont and not hereinbefore mentioned, were owned by the maker and where were the same located? (See Sec. 682 G. L.)

22. If the maker hereof on April 1, 1919, resided or was domiciled within the State of Vermont, what personal estate then situated in another state or government and not therein taxed was then owned by such maker? See Sec. 684-IV G. L.)

23. On April 1, 1919, what was the total value in money of all existing debts then due or thereafter to become due to the maker hereof from all insolvent debtors within or without the State of Vermont? (See Sec. 684 Subd. 13 G. L.)

24. On April 1, 1919, how many and what state, county, city, town, village, municipal, railroad or other bonds of whatever name or nature except such as are enumerated in questions 38 and 39 were owned by the maker hereof and what was the par value thereof?

Lister's valuation.

25. On April 1, 1919, what was the aggregate amount of

a. Existing debts then due or thereafter to become due to the maker hereof from all solvent debtors within or without the State of Vermont? (See Sec. 684 Subd. 12, G. L.)

b. Unpaid income or interest on United States government bonds or other securities specially exempt from taxation under the laws of the United States, represented by coupons or otherwise then due to such maker? (See Sec. 682 G. L.)

c. Cash on hand other than bank deposits, then belonging to or held by such maker? (See Sec. 682 G. L.)

d. Checks or drafts on all savings banks, savings institutions, trust companies, savings bank and trust companies, national banks, banking houses, or other banks, located within or without the State of Vermont, then owned or held by such maker?

e. Deposits then standing in the name of or owned by such maker, in all savings banks, savings institutions, trust companies, savings bank and trust companies, national banks, banking houses, or other banking institutions located without the State of Vermont, and evidenced by deposit books, certificates of deposit or otherwise? See Subd. 8, Sec. 703 G. L.)

f. Deposits then standing in the name of or owned by such maker in all national banks within the State of Vermont and evidenced by deposit books, certificates of deposit or otherwise, other than deposits in national banks whereon interest exceeding the rate of two per cent per annum is by such national banks paid or allowed. (See Subd. 7, Sec. 703 G. L.)

52 26. State the number of shares of capital stock in national banks, trust companies and savings bank and trust companies in Vermont held by the maker hereof on April 1, 1919, the par value thereof, and the name of the bank issuing the same. (See Sec. 712 G. L.)

27. Give the name of each corporation other than banking, insurance, surety, railroad, transportation, car, telephone and telegraph companies chartered under the laws of the State of Vermont, wherein the maker hereof on April 1, 1919, owned shares of capital stock, the par value thereof and the number of shares so owned. (See Sec. 712-1064 G. L.)

Lister's valuation.

28. Give the name of each corporation chartered under the laws of any state or government other than the State of Vermont wherein the maker hereof on April 1, 1919, owned shares of capital stock, the par value thereof and the number of shares so owned? (See Sec. 684 Subd. 3, G. L.)

29. If the maker hereof is a corporation or an association state the number of its shares of capital stock outstanding on April 1, 1919; the par value thereof and the amount of surplus and undivided profits then held by it? (See Sec. 682 G. L.)

30. On April 1, 1919, did the maker hereof as executor, administrator, guardian, trustee, or in any other capacity whatever, hold in trust or otherwise for another, taxable personal property in this state? If so where was such property then located and in what capacity was it being so held? (See Sec. 714 G. L.)

31. On April 1, 1919, what other taxable personal estate of whatever name or nature, not hereinbefore mentioned, was held or owned by the maker hereof?

Total Personal Estate.....$.....

Offsets.

32. In what other town or towns in Vermont was the maker hereof taxable for personal estate on April 1, 1919. (See Sec. 774 G. L.)

33. On April 1, 1919, what debts did the maker hereof unconditionally owe, on account of which a deduction is claimed? State the name and post office address of each creditor, the amount due, the date when such debt was contracted and rate of interest, if any, on each. (See Sec. 768 G. L.)

Creditor's name.	Post office address.	Amt. due.	Date.	Rate.	Amt. due.
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

Total Amount Indebtedness.....$.....

53 34. Was any other person, co-partnership, corporation or Association jointly liable with the maker hereof for any of the aforesaid indebtedness? If so state the names of such creditors, the names of all such joint debtors, and the total amount of such joint indebtedness. (See Sec. 773 G. L.)

35. Is the maker hereof in any manner liable, except as principal, to pay any part or all of the aforesaid indebtedness? If so state the nature and extent of such liability. (See Sec. 773 G. L.)

NOTE.—In case an offset is claimed questions 35 to 43, inclusive must be answered.

36. On April 1, 1919, what was the aggregate amount of deposits belonging to the maker hereof in all national banks in Vermont, whereon interest exceeding the rate of two per cent per annum is paid or allowed by such bank? (See Sec. 768 G. L.)

37. On April 1, 1919, what was the aggregate amount of deposits belonging to the maker hereof in all savings banks, savings institutions, trust companies and savings bank and trust companies chartered under the laws of Vermont? (See Sec. 768 G. L.)

38. On April 1, 1919, what was the aggregate par value of United States government bonds or other securities exempt from taxation under the laws of the United States then owned by such maker? (See Sec. 768 G. L.)

39. On April 1, 1919, what amount of notes, bonds or orders issued (as evidences of obligations for money loaned to municipalities) named in section 684 Subd. XII of the General Laws, was owned by such maker? (See Sec. 768 G. L.)

40. On April 1, 1919, what shares of capital stock in railroad, transportation, car, insurance, surety, telephone and telegraph corporation, chartered under the laws of the State of Vermont were owned by the maker hereof? State the name of each corporation, and the number and par value of such shares. (See Secs. 768-1064 G. L.)

41. On April 1, 1919, did the maker hereof own shares of capital stock in one or more corporations whose manufacturing establishments, quarries, mines, machinery put into unoccupied buildings, capital and personal property used in such building, business or real estate used and occupied for hotel purposes were lawfully exempted from taxation by vote of the town wherein such property is located? If so, state the name and domicile of such corporation and the number and par value of such shares.

42. If the maker hereof on April 1, 1919, owned shares of stock in a corporation situated in another state or government
54 wherein all the stock of such corporation is taxed to the holders thereof wherever residing or wherein such corporation is taxed for all its stock, state the names and domicile of each such corporation and the number and par value of such shares. (See Sec. 684 Subd. 3-768 G. L.)

43. What loans within the state made at a rate of interest not to exceed five percent per annum, evidenced by a promissory note, mortgage on real estate or personal estate, or by a bond for a deed, including credits representing the purchase price or any part thereof, of

real estate or tangible personal estate within this state, sold or transferred, evidenced by a promissory note, mortgage or bond for a deed, and ordinary charges of book account representing the purchase price of tangible personal property on which no interest is charged, were held or owned by you on the first day of April of the present year? State the name and address, residence or domicile of each borrower, the date, amount and nature of each loan, rate of interest thereon, and the date when payment of the loan becomes due to the maker hereof. (Evidenced by what? See Sec. 684, Subd. 13 G. L.)

Borrower's name.	Residence or domicile.	When made.	Amount.	Evidenced by.	Rate.	When due.
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....

Deductions from Indebtedness.

44. What loans without this state, stocks, bonds, choses in action or securities of any kind executed by individuals, firms, municipal or other corporations, without this state, were held or owned by you on the first day of April of the present year, which you claim to be exempt from local taxation because of state taxation thereon, and of what person did you negotiate or obtain the same. (See Secs. 746-747 G. L.)

NOTE.—No answer is required to the following question, if the national banks having the deposits therein mentioned file stipulation in writing *agreed* to pay to the State of Vermont seven-twentieth- of one per cent of the average amount of all such deposits held by it for six months beginning on April 1, 1919.

45. On April 1, 1919, did the maker hereof have any deposits in a national bank in this State, whereon interest exceeding the rate of two per cent was paid or allowed by such bank? State the name of each national bank having such deposits; and the amount on deposit in each bank, with all accrued interest thereon. (See Secs. 1070, 1072-1087 G. L.)

(Sign here) GEO. H. CHEDEL,
Div. Supt.

55 I, Geo. H. Chedel, Div. Supt. of White River Junction, Vt., do solemnly swear (or affirm) that the foregoing inventory by me subscribed is a full, true and correct list and description of all my taxable property, both real and personal, and all property which should be set in the list to me that my answers to the interrogatories contained in said inventory are correct; that I have set down only such debts as I am unconditionally bound to pay to the amount of the deduction claimed that I have not conveyed or disposed of any property or estate in any manner nor created any debt

for the purpose of evading the provisions of law or affecting the value or amount of my taxable estate. So help me God. Or under the pains and penalties of perjury.

Brattleboro, ——.

(Sign here) GEO. H. CHEDEL,
Div. Supt.

STATE OF VERMONT,
Windham County:

At White River Jct. in said county on this 12th day of April, 1919, personally appeared the signer of the foregoing inventory and affidavit and made solemn oath (or affirmed) that the same are true.
Before me,
[SEAL.] EMMETT J. EATON,
Notary Public.

56 STATE OF VERMONT,
Washington County, ss:

I, Lewis C. Moody, Clerk of the Supreme Court of the State of Vermont (General Term) which is a Court of Record, having a seal as hereto attached, do hereby certify that the foregoing are true copies of the original exhibits in a cause entitled Champlain Realty Company vs. Town of Brattleboro, now remaining in the office of the Clerk of said Court, by me this day examined and herewith compared.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Montpelier, in the County of Washington, this 28th day of May, A. D. 1921.

[Seal of Supreme Court, State of Vermont.]

LEWIS C. MOODY,
Clerk.

57 Copy.

No. 2184.

CHAMPLAIN REALTY CO.

v.

TOWN OF BRATTLEBORO.

Be it remembered that, at the October Term, 1920, of this Court, the Town of Brattleboro, a municipal corporation, existing under and by virtue of the laws of the State of Vermont, in the County of Windham, brings into this Court the action of the Champlain Realty Company, a corporation organized and existing under the laws of the State of New York, with the principal office at Corinth, Saratoga County, State of New York, against it, declaring in the common counts in assumpsit, for taxes illegally assessed for the

year 1919, and paid under protest, by way of exceptions to the judgment of the County Court, rendered at the September Term, 1920, as by the defendant's bill of exceptions and records and files, of said County Court, more fully appears.

And the said cause being duly entered, in this Court, the plaintiff comes by Harvey, Maurice and Fitts, its attorneys, and the defendant comes by A. P. Carpenter and E. W. Gibson, its attorneys, to prosecute its exceptions, and said cause is continued until the present May Term, 1921, of this Court, when the respective parties appear by their aforesaid attorneys, and said exceptions are read and arguments of counsel are made, and due deliberation being thereupon had, it is considered, by the Court here, that the judgment of the County Court be reversed, and judgment entered for the defendant to recover its costs.

A true record.
Attest:

[Seal of Windham County, Vermont.]

WM. R. DALEY,
Clerk.

58 STATE OF VERMONT,
Windham County, ss:

I, Wm. R. Daley, Clerk of the County of Windham and Clerk of the Supreme Court within and for said County, the same being a Court of Record, and having a seal, hereto attached, do hereby certify that the within and foregoing is a true copy of the record of the judgment, in said Court, in the cause entitled Champlain Realty Co. v. Town of Brattleboro as the same now appears on file and record in the office of the Clerk of said Court.

In testimony whereof, I have hereunto subscribed my official signature, and affixed the seal of said Court, at Brattleboro, in said County of Windham, this 22nd day of June, A. D. 1921.

[Seal of Windham County, Vermont.]

WM. R. DALEY,
Clerk.

59 CHAMPLAIN REALTY COMPANY

v.

TOWN OF BRATTLEBORO.

All Sitting.

TAYLOR, *J.:*

In this action the plaintiff seeks to recover taxes paid under protest. The plaintiff is a corporation organized under the laws of New York, but at all times material to this inquiry duly authorized

to do business in this State. It was listed for taxation in the defendant town in the year 1919 in part on account of certain property on which the taxes were paid without objection. The dispute arose over 1,500 cords of pulp wood which was appraised and set in the list at $30,000. The plaintiff filed a tax inventory of its property in Brattleboro on April 1, 1919, wherein it specified that it was the owner of 1,500 cords of pulp wood situated in the town of Brattleboro on the West River and its banks, but claimed that the same was not taxable as it was in transit in interstate commerce. The various taxes payable to the defendant town, assessed on so much of the plaintiff's list as related to this pulp aggregated $485.50. These taxes were paid under protest and this action immediately brought for their recovery. The cause was tried by court and on the facts found judgment was rendered for the plaintiff. It is here for review on defendant's exceptions, which include an exception to the judgment.

The only objection to the validity of the tax was and is that the pulp wood for which the plaintiff was taxed, was on April 1, 1919, in transit in interstate commerce and so outside the taxing power of the State. As bearing upon this question the court found the following facts: During the winter of 1918-19, the plaintiff cut pulp wood, in all about 10,000 cords, in the towns of Jamaica, Stratton, Londonderry and Winhall in this State. The plaintiff maintains a
60 mill at Hinsdale in the state of New Hampshire, about three miles below Brattleboro, where its pulp wood is rossed and bolted. The wood, cut four feet long, was placed upon the banks of West River and its tributaries to be floated down into the Connecticut and thence to its destination at the mill in Hinsdale. The waters of the West River are wholly in this State and empty in the town of Brattleboro into the Connecticut. West River and its tributaries had been used for driving pulp wood to the mill at Hinsdale in the years 1917 and 1918. A single log boom is provided at the mill to receive the wood floated down the river, but is incapable of holding it all when the water in the Connecticut is high and the current swift, and the wood is liable to be carried over and drawn under the boom and lost. A pond of considerable size is formed near the mouth of West River in the town of Brattleboro by water set back from the Connecticut by the dam at Vernon. Plaintiff maintains a boom at this point to hold and control the logs driven down West River until the water in the Connecticut has receded sufficiently to permit of their being held in the boom at Hinsdale.

On March 25, 1919, the plaintiff began putting the pulp wood into the West River and its tributaries, the water in these streams then being high, intending to drive it down the river and thence into the Connecticut and down that river to its mill in Hinsdale. In anticipation of the probable high water in the Connecticut, plaintiff had previously placed its boom across West River near its mouth to hold the wood there until the water in the Connecticut had reached enough to allow it to be held at the mill at Hinsdale. The wood floated down West River on the high water and the head of the drive reached the boom at the mouth of West River on March 27, 1919.

At that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood into that river as it could not be held at the Hinsdale boom. For this reason and no other the plaintiff held its wood in the boom at Brattleboro. The Con-
61 necticut was not suitable for driving pulp wood from the time the drive began until April 3, on which date the plaintiff's servants cut the boom at the mouth of West River so that the wood could pass into the Connecticut. Prior to April 3, only about 4,000 cords of the wood had reached and been held at the West River boom. The balance arriving later went through to Hinsdale without stopping. On March 28, 1919, when there was by estimation about 4,000 cords of wood in the West River boom, it broke allowing some of the wood to escape into the Connecticut and onto the Retreat meadow in Brattleboro near the mouth of West River. The boom was repaired on March 29, 1919. At this time the part of West River where the wood laid back of the boom, called the holding ground, was frozen, so the wood if not boomed could not have continued on its journey into the Connecticut at that time. On April 1, 1919, about 1,500 cords of the pulp wood was being held in plaintiff's boom at the mouth of West River. Some wood that was lodged on an island and the wood on the Retreat meadow remained after the boom was cut. The latter remained on the meadow about two weeks and had to be taken out by a process called "booming" or "warping." None of this 1,500 cords was cut in the town of Brattleboro. All of it had been carried down West River and was destined for the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut. The drive of pulp wood down West River to the Connecticut and thence to the rossing plant at Hinsdale was in continuous operation from March 25th until it was completed on May 9th and was conducted properly to make an uninterrupted passage, so far as possible.

No question is made but that the pulp wood on account of which the plaintiff was taxed, viz., the 1,500 cords of wood held in the boom on April 1, 1919, was taxable in the defendant town unless within the protection afforded by the commerce clause of the Federal Constitution. The parties do not disagree as to the general rule
62 governing this class of cases. Products of a state intended for exportation to another state do not cease to be a part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey, or, as otherwise stated, until they have entered upon their final journey out of the state. Coe v. Errol, 116 U. S. 517, 525, 29 L. ed. 715, 719; Diamond Match Co. v. Village of Ontonagon. 188 U. S. 82, 47 L. ed. 394. As frequently happens, the difficulty in this case arises in the application of the settled rule to the facts found. Here, the wood was being transported by the plaintiff, its owner, and was subject at all times to its complete control, so the rule laid down when the transportation is by a common carrier does not apply. It is not a case where goods from outside the state are detained in

transit within the state. Such goods are already under the protection of the Constitution when they cross the border and are subject to a different rule. Coe v. Errol, supra. Applied to products of the state intended for exportation, the precise question is when they acquire the impress of interstate commerce.

It is well to note at the outset that this being an action to recover money paid as a tax, the burden is upon the plaintiff to show that the tax was illegally assessed; or, to be specific, to establish the interstate character of the transportation. Sullivan v. Ashfield, 227 Mass. 24, 116 N. E. 565; Forsyth v. County, Mass. 123 N. E. 699; Jackson v. Town of Union, 82 Conn. 266, 73 Atl. 773; Warwick & Coventry Water Co. v. Carr, 24 R. I. 226, 52 Atl. 1030; Portland, etc., R. Co. v. City of Saco, 60 Me. 196; Savings & Loan Co. v. City of San Francisco, 146 Cal. 673, 80 Pac. 1086; Iron Co. v. Township, 186 Mich. 626, 153 N. W. 14; Houston v. County, 90 Wash. 209, 155 Pac. 773; Hardware Co. v. County, — Colo. —, 121, Pac. 157; Davis V. 63 Otoe Co., 55 Neb. 677, 76 N. W. 465. See Babcock v. Granville, 44 Vt. 325; City of St. Louis v. Mehans, 236 Mo. 8, 139 S. W. 450.

We have no case in point. The defendant relies upon Guilford v. Smith, 30 Vt. 49, but the decision in that case sheds no light on the question at issue here. That was an action in replevin and involved the right of stoppage in transitu where flour shipped by the vendor from a point in Canada, consigned to parties in Ogdensburg, N. Y., to be forwarded to the vendee in Burlington, Vermont, was held in storage at Ogdensburg awaiting forwarding orders. It was held in the circumstances, which we need not detail, that the vendee had acquired constructive possession of the flour and that the transit was at an end, as the flour had reached a place where it awaited a fresh direction to be given to it by the vendee and so was not being held to transport, but to keep, when the vendor attempted to exercise the right of stoppage.

As the case presents a Federal question it is controlled by principles to be found in the decisions of the Supreme Court of the United States. There are three distinct classes of decisions fixing the limits of State and Federal authority when the question of interstate transportation is involved. In one class the question is when the article ceases to be the subject of interstate commerce because of the termination of the transportation. In another class are cases dealing with the status of property which has become the subject of interstate commerce, but is detained in transit for one cause or another before reaching its final destination. Then, there is the class where, as here, the question is when the state loses jurisdiction over its own products for the reason that they have passed under Federal authority. Counsel cite cases of the different classes indiscriminately, without taking note of distinctions clearly recognized in some of the cases, though not always definitely pointed out. The basic principle of all the cases is the same. Property actually in transit from one state to another is exempt from local taxation as an

unlawful interference with interstate commerce. Moreover,
64 it is a principle common to the several classes of cases that there may be an interior movement of property which does not constitute interstate commerce, though it come from or be destined to another state. But when interstate transportation begins, when it is suspended so that the commodity becomes subject to state laws, or when it ends, are questions requiring the application of different principles. It is manifest that we are concerned only with the question when interstate transportation begins. As the principles vary with the questions under discussion, we shall avoid unnecessary confusion by giving particular attention to the views of the Court in that class of cases.

The leading case is Coe v. Errol, supra, in error to the Supreme Court of the State of New Hampshire. It was heard below on plaintiff's petition for the abatement of taxes assessed on certain logs owned by the plaintiff and others lying in the town of Errol on the date of the annual appraisal for taxation, ready to be floated down the Androscoggin River to Lewiston, Maine, to be manufactured and sold. Part of the logs had been cut in the State of Maine and were on their way of being floated to Lewiston but were detained in the town of Errol by low water. Part of the logs had been drawn the winter before from a neighboring town in New Hampshire and placed in Clear Stream and on its banks in the town of Errol to be floated down the Androscoggin River. The selectmen of Errol appraised all of the logs for taxation and assessed the usual taxes thereon. Plaintiff claimed that none of the logs were subject to taxation in Errol for the reason that they were in transit to market from one state to another. The Supreme Court of New Hampshire abated the portion of the tax assessed upon the logs cut in Maine and sustained the assessment upon those cut in New Hampshire. The plaintiff carried the case to the Supreme Court of the United States on a writ of error to review so much of the decision as was adverse, on which the judgment below was affirmed. Mr. Justice Bradley,
speaking for the Court, said that the question for considera-
65 tion was whether the products of a state, although intended for exportation to another state and partially prepared for that purpose by being deposited at a place or port of shipment within the state, were liable to be taxed like other property within the state. After observing that the question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine on which the tax was abated, the general proposition is laid down that the logs in question would be under the protection of the Constitution when actually started in the course of transportation to another state, or delivered to a carrier for such transportation.

We quote somewhat extensively from the argument that follows for the light which it sheds upon the application of the rule to the facts of the particular case. "There must be a point of time when they (goods intended for transportation out of the state) cease to be governed exclusively by the domestic law and begin to be governed

and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until the- are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and *and* liable to taxa-
66 tion there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state * * *. If such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property and in the usual manner, they not being in the course of transportation at the time, is there any valid reason why they should not be taxed? Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding. * * * No definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. We think this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner intended for exportation. If such were the rule in many
67 states there would be nothing but the lands and real estate to bear the taxes. Some of the western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as their

products are on the lands which produce them they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true it is said in the case of The Daniel Ball, 10 Wall. 565, 19 L. ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is altogether a matter in fieri and not at all a fixed and certain thing * * *. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the state of Maine. They had only been drawn down from Wentworth's Location to Errol, the
place from which they were to be transported to Lewiston
68 in the state of Maine. There they were to remain until it
should be convenient to send them to their destination. They come precisely within the character of property which according to the principles herein laid down, is taxable."

Another case of the same class is Diamond Match Co. v. Village of Ontonagon, 188 U. S. 82, 47 L. ed. 394. The plaintiff, an Illinois corporation engaged in the manufacture and sale of matches in the city of Chicago, was the owner of a large amount of pine wood, timber, etc., situated on the Ontonagon River and its tributaries in the state of Michigan. It also operated saw mills located at Green Bay in the state of Wisconsin for manufacturing its logs into lumber. The route of the logs from the forests to the mills was as follows: They were driven down Ontonagon River and its tributaries to a boom near its mouth in the defendant village where they were loaded aboard cars and shipped by rail to Green Bay. Owing to a forest fire which burned over the plaintiff's lands, and for the purpose of preserving the timber, logs were cut from the burned tract largely in excess of what the plaintiff could utilize in any one season at its mills. They were floated down to booms some distance above the boom near the mouth of the river and outside the limits of the village of Ontonagon where they were held to be sent on to the lower boom as fast as they could be transported by rail and

manufactured into lumber. Such was the situation of the logs in controversy at the close of the season of 1898, except about 500,000 feet which were in the lower boom awaiting transportation. The statute of Michigan under which the assessment was made provided that property in transit to some place without the state should be assessed at the place in the state nearest to the last boom or sorting gap of the stream in or bordering on the state in which said property will be last floated during the transit thereof. In April, 1899, before the condition of the river permitted movement of the logs, the village of Ontonagon assessed the tax in question. It was contended
69 that the movement of the logs commenced when they first started on their course down the river and from that time were in continuous transit as subjects of interstate commerce. The Court re-stated the holdings in Coe v. Errol and in its decision sustaining the tax remarked that the contention was more extreme than that made and rejected in the latter case. In the course of the argument Mr. Justice McKenna, who delivered the opinion, said: "No purpose to burden interstate commerce is evident in the statute, and the power of the state to tax everything which is part of what has been called 'the general property' or 'the general mass of property,' of the state is undoubted. But things which have been brought to a state may not have reached that condition. Things intended to be sent out of the state, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out,—may be confused by circumstances,—and the confident assignment of the property as subject or not subject to taxation is not easily made." Then follows a review of the cases, including Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257; Pittsburg, etc., Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538. Their substance, as defining the taxing power of a state, is declared to be that while the property is at rest for an indefinite time awaiting transportation it is subject to taxation; but if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment.

No other decision of the Supreme Court of the United States involving the right of a state to tax products thereof destined for export is called to our attention. Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, is referred to. In that case grain shipped from southern and western states under contracts for transportation to eastern points with the privilege of removing it from the cars at Chicago for the
70 purpose of inspecting, weighing, cleaning, mixing, etc., was purchased by the plaintiff while in transit. Upon its arrival at Chicago plaintiff availed himself of the privilege and removed the grain to his private elevator, solely for the purpose specified. The grain remained in the elevator only for such time as was reasonably necessary for the purposes mentioned, when it was turned over to the railroad companies and forwarded by them to its original destination in accordance with the contracts of transportation. The grain was taxed to the plaintiff while at rest in the elevator. The Supreme Court of Illinois sustained the tax on the ground that the grain was not exempt from local taxation as being

in transit in interstate commerce. Mr. Justice Hughes delivered the opinion of the Court affirming the judgment below. While the question for decision was dissimilar, in that the case involved the question when property being transported through the state was subject to taxation, still the opinion announces principles that are applicable to the case at bar. It is said that the denial of the power to tax articles actually moving in interstate transportation rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The question is determined by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority. The question was said to be whether the grain there involved was moving in interstate commerce so that the imposition of the local tax may be said to be repugnant to the Federal power. We quote from the opinion: "Neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling, when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The
71 plaintiff in error had withdrawn it from the carrier. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination. (Citing cases.) The question it should be observed, is not with respect to the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority * * *. The property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation, and there was nothing inconsistent with Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of local government."

General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, involved the same principle. Oil which had been brought from Pennsylvania to Memphis, Tenn., a distributing point, was held in tanks, one of

which was kept for oil for which orders had been received from southern points outside the state prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked "Oil already sold in Arkansas, Louisiana and Mississippi." The oil remained in the tank only a few days,
72 —long enough to be properly distributed according to the orders. The local tax upon the oil was sustained. Susquehanna Coal Co. v. So. Amboy, 228 U. S. 665, 57 L. ed. 1015, is another case involving the cessation of interstate commerce. Coal was shipped by its owner, the plaintiff in error, from points in Pennsylvania to its own order at a New Jersey tidewater port destined to points outside the latter state, where if boats were not available for its continuous transportation, it was dumped into a storage yard to be later transferred to boats as occasion required. It was held subject to local taxation while awaiting reshipment. The Court said: "The coal, therefore, was not in actual movement through the state; it was at rest in the state, and was to be handled and distributed from there." On the authority of the two cases last referred to it was held that, while the delay was to be temporary, a postponement of the transportation of the coal to its destination, there was a business purpose and advantage in the delay which was availed of; and that while it was availed of, the product secured the protection of the state, subjecting it to the dominion of the state.

The decisions of other courts are of little aid except as they illustrate the application of the principles announced in the decisions of the Supreme Court of the United States. Among those cited is State v. Tabre Lumber Co., 101 Minn. 186, 13 L. R. A. (N. S.) 800. The case involved the validity of a tax levied May 1, 1905, on certain logs owned by the defendant, a corporation engaged in the manufacture and sale of lumber products at Keokuk, Iowa. It obtained the logs for its mills from its own land in the state of Minnesota, having a continuing contract with the Itasca Lumber Company, a Minnesota corporation, to cut and transport the logs. During the winter of 1904-5 the logs in question were cut, hauled and piled on the ice in certain lakes. Before the ice melted in the spring the logs were enclosed in booms to prevent their becoming scattered and preparatory to driving the same to hoists maintained by a railroad
73 where they were to be loaded onto cars and thence transported by rail out of the state. On May 1, 1905, the logs in two of the lakes had not been disturbed. Those on a third, connected by channel with still another lake reached by the railroad, had been sluiced through the channel prior to May 1, preliminary to being delivered at the hoist maintained on that lake. Subsequent to May 1, all the logs were taken from the respective places where they had been boomed and moved to the hoists, loaded and transported in due course to the mills at Keokuk.

It was claimed that delivery to the railroad for the purpose of exportation was complete immediately the logs were banked upon the ice and the booms thrown about them preparatory to their being carried to the hoists; in other words, that this was equivalent to depositing them in the depot of the common carrier. It was further

claimed that the Itasca Lumber Company in towing the logs from the booms to the hoists, causing them to be conveyed by railroad to the Mississippi River, driving them down the river and delivering them to the defendant was engaged in the business of transporting the logs on their journey out of ths etate. The case was made to turn on the question whether on May 1st, the logs had been delivered for exportation. It was held that if they were delivered to the common carrier for transportation out of the state when they were banked and boomed on the ice they had become subject of interstate commerce before the tax was levied; but, if towing the logs to the hoists was part of the work of delivery to the common carrier, then, on authority of Coe v. Errol, the logs had not ceased to be a part of the general mass of property of the state when taxed. The Court said: "The question does not turn upon the length of time which existed between the banking and booming of the logs on the ice and their transportation to the hoists; nor is it a controlling factor that it was the purpose and intent of the appellant company (the defendant)
from the beginning that all of the logs cut pursuant to the
74 contract with the Itasca Lumber Company should be transported in the usual and ordinary way to its mill at Keokuk, and that in fact such result was finally accomplished during the season of 1905 * * *. In our judgment, it conclusively appears from the evidence that on that date (May 1st) all of the property was still under the dominion and control of the appellant through its agent, the Itasca Lumber Company, and that a material part of the work of delivering for exportation was still to be done * * *. The fact that the Itasca Lumber Company, for its own convenience, banked the logs on the ice and afterwards towed them through the lakes to the hoists rather than haul them over the ice and deliver them within the booms at the hoists during the cutting season, in the winter, did not change the character of the relation between the appellant and that company. Either process constituted a part of the work of delivering the logs for exportation." Referring especially to the logs sluiced out of the upper lake before May 1st, preparatory to towing them to the hoist, the Court held that they were then merely in the process of delivery to the railroad company. The judgment of the court below sustaining the tax as to all the logs was affirmed.

In Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254, logs being floated on their way from Wisconsin down the Mississippi River to Burlington, Iowa, were detained in a boom in New Boston, Illinois, for the convenience of the owner, the plaintiffs, as it would be liable to loss on the breaking up of the ice in the spring. It was held that the logs were kept at New Boston for the profit of the owner and so were taxable there. Prarie Oil & Gas Co. v. Ehrhardt, 244 Ill. 634, 91 N. E. 680, is relied upon by the plaintiff; but there the oil, which was being pumped in a privately owned pipe line, was in transit from a point in the state of Kansas across the state of Illinois to a point farther east. It was attempted to tax said oil in the pipes and in tanks along the line employed solely to maintain a constant
flow. There was no intention to hold the oil in the taxing
75 district and its progress across the state was uninterrupted except by accident. It was held that the oil was exempt from

local taxation, as it was moving in interstate commerce and had not acquired a status in Illinois so as to become part of the property of the district through which it was passing.

In the Minnesota case, as we have seen, the question was when the logs were delivered to a common carrier for transportation, while the Illinois cases illustrate the principles that apply when goods brought into the state in the course of interstate commerce are subject to taxation and when they are not. Even in this class of cases the Federal protection from local taxation continues only while the goods are in actual transit; and if they are detained for an indefinite time during such transit, other than for natural causes or lack of facilities for immediate transportation, they may be lawfully assessed by the local authorities. Kelly v. Rhoades, 118 U. S. 1, 47 L. ed. 359, and other cases there cited. These and other decisions in cases of the same class involve a principle not applicable to the case at bar. In such cases the cause and purpose of the interruption of the transit is of primary importance. If the delay is merely an incident of the transportation, the goods do not lose their interstate character; but if the delay is for the benefit or convenience of the owner, and the goods are to remain at rest during his pleasure, they are not the subject of interstate commerce to the extent that they are exempt from local taxation.

Stated briefly, the following principles are to be applied to the facts found in the instant case: The state has undoubted power to tax its own products while within its jurisdiction, though intended for exportation, if taxed as part of the general mass of property in the state, unless and until such products have become the subject of interstate commerce. The limitation of this power rests upon the supremacy of the Federal power to regulate interstate commerce, and finds its justification in the necessity that commerce between
76 the states should be free from the burden of such local exactions as are inconsistent with the control and protection of that power. It is only when and because the otherwise inclusive power to tax must be deemed to be in conflict with Federal authority that the power is denied; and, if the exercise of the taxing power is not inconsistent with the authority of Congress to regulate interstate commerce, no right is invaded. In other words, the purpose of the rule under consideration is not the exemption of property from taxation but the protection of Federal authority. In view of the importance, both to the shipper and to the state, that the point of time should be clearly defined when state jurisdiction ends and Federal authority begins "so as to avoid all ambiguity or question" (Coe v. Errol, supra), the Supreme Court has formulated a rule applicable to products of a state intended for exportation to another state. It distinguishes between transportation by a common carrier and by other means. For obvious reasons, in case *of* the former Federal authority is deemed to have attached when the goods are shipped or entered with a common carrier for transportation to another state. They are then out of the control of the owner and their destination is fixed and certain. To every intent they are in transit out of the

state. To mark the time with equal certainty when goods being transported in any other way pass from state to Federal control, the time when they have started for transportation out of the state in a continuous journey is selected. All movements within the state preparatory to the final movement that will carry the goods out of the state are preliminary to interstate transportation and not part of it. The intent with which the preparations for the interstate journey are made does not affect the result. Nor is the length of time between the completion of the preparations and the beginning of the movement out of the state material. Applying these principles to the circumstances of the case at bar, it seems clear that the
77 pulp wood, on account of which the plaintiff was taxed, was not on April 1st beyond the taxing power of the state. It was then at rest in the boom at Brattleboro for a time necessarily indefinite and for a purpose beneficial to the plaintiff. The immediate destination of this wood and the some 2,500 cords that escaped into the Connecticut when the boom broke, was the so-called "holding ground" at the mouth of West River, although its ultimate destination was Hinsdale, N. H. The findings as to the breaking of the bom and its consequences are insignificant. It was a mere accident attending the movements that were planned. The restoration of the boom was necessary to the original plan and gives undoubted character to all the pulp wood that was started on its way down West River before the boom was cut. It could not have been intended that any of it was to move out of the state until such time as the plaintiff should see fit to send it on its way. It was at rest in this State awaiting the voluntary act of the plaintiff that should start it on its ultimate journey out of the state. It was fully in the plaintiff's control and could be exported or not as it should see fit. It is quite immaterial that pulp wood later started on the drive went through to Hinsdale without interruption. The wood with which we are now concerned did not start on its final movement—its ultimate passage—out of the state in a continuous journey until released from the boom at Brattleboro. It could not well be said that listing it for taxation while so at rest must be deemed to be in conflict with Federal control, for it had not yet come under such authority. So far as this wood was concerned when it started on the drive, the route out of the state was not available—a fact well known to the plaintiff. The findings make it evident that the wood started down the West River and its tributaries before the Connecticut was drivable to take advantage of the high water without which West River could not be driven. For its own purposes the plaintiff maintained the boom at Brattleboro as a facility for retaining control of the pulp wood until it would be to its advantage to send it on out of the state.
78 The movement down West River to the boom was merely preparatory to its ultimate journey out of the state. The character of this stage of the transportation is no different than it would have been if the wood had been drawn to the boom on sleds or carts. Coe v. Errol, supra.

The finding that the drive was in continuous operation from March 25th until it was completed on May 9th and was conducted

properly to make an uninterrupted passage, so far as possible, does not affect the result. So far as it is a finding of fact, it must be construed in the light of the specific findings as to what actually took place; and when so read there is no inconsistency. The work on the drive continued from the time the first pulp wood was started down West River until the last wood arrived at Hinsdale. So far as possible, in view of what is recited elsewhere in the findings, the drive was conducted properly to make an uninterrupted passage. But that it was not uninterrupted, as well as the occasion for the interruption, are clearly shown by the findings. The essential facts were plainly not in controversy and made the conclusion to be drawn therefrom a question of law. Philadelphia, etc., Ry. Co. v. Hancock, 253 U. S. 284, 64 L. ed. 907. The fact that the transit was interrupted only so long as necessary to make it possible to send the wood on its way in safety does not change the character of the initial transportation any more than did a similar circumstance prevent the interruption of an interstate journey in Bacon v. Illinois and General Oil Co. v. Crain, supra.

This view of the case on the facts as found makes it unnecessary to consider other exceptions taken at the trial.

Judgment reversed and judgment for the defendant.

WILLIAM H. TAYLOR,
Associate Justice.

79 I, Frank D. Thompson, Reporter of Decisions of the Supreme Court of Vermont, hereby certify that the foregoing is a true copy of the opinion of the Supreme Court of Vermont in the case of Champlain Realty Company v. Town of Brattleboro, handed down at its May Term, 1921, and filed with me on May 7, 1921, as compared with the original now on file.

Done at Barton in the county of Orleans and State of Vermont, this 9th day of June, 1921.

FRANK D. THOMPSON,
Reporter of Decisions.

80 STATE OF VERMONT,
Washington County, ss:

I, Lewis C. Moody Clerk of the Supreme Court of Vermont (General Term) which is a Court of Record, having a seal as hereto attached, do hereby certify that the foregoing is a true copy of the original opinion in a cause entitled Champlain Realty Company vs. Town of Brattleboro by said Court heard and determined at a term thereof begun and held at Montpelier, within and for the County of Washington, on the first Tuesday of May A. D. 1921, as appears by the said original record, now remaining in the office of the Clerk of said Court, by me this day examined and herewith compared.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the City of Montpelier, in the County of Washington, this 14th day of June A. D. 1921

[Seal of State of Vermont Supreme Court.]

LEWIS C. MOODY, *Clerk.*

81 STATE OF VERMONT,
Windham County, ss:

I, Wm. R. Daley, Clerk of the County of Windham and Clerk of the Supreme Court within and for said County, the same being a Court of Record, and having a seal, hereto attached, do hereby certify that the within and foregoing is a true copy of the original Writ, Plaintiff's Specifications, Defendant's Motion for a Jury Trial, Plaintiff's Request for Findings of Fact, Defendant's Requests for Findings of Fact, Findings of Fact, Defendant's Exceptions, Docket Entries, Original Exhibits, and the Record of the Judgment, in the cause entitled Champlain Realty Co. v. Town of Brattleboro, as the same now appears on file and record in the office of the Clerk of said Court.

In testimony whereof, I have hereunto subscribed my official signature, and affixed the seal of said Court, at Brattleboro in said County of Windham, this 27th day of June A. D. 1921.

[Seal of Supreme Court, Windham County, Vermont.]

WM. R. DALEY,
Clerk.

82 [Endorsed:] Supreme Court of the State of Vermont. Champlain Realty Company against Town of Brattleboro. Transcript of Record and Opinion. William C. Cannon, Attorney at Law, 15 Broad Street, Borough of Manhattan, City of New York.

Copy.

File No. 28,381.

Supreme Court of the United States, October Term, 1921.

No. 426.

CHAMPLAIN REALTY COMPANY, Plaintiff,

vs.

THE TOWN OF BRATTLEBORO, Defendant.

Certiorari to the Supreme Court of the State of Vermont.

Stipulation of Counsel Relative to Return to Writ of Certiorari.

Whereas, the Supreme Court of the United States has heretofore granted the petition of the plaintiff in error for a writ of certiorari to review the record in the above cause, and under date of October 20, 1921, issues its writ of certiorari directing the above court to send to it the record and proceedings in the above cause, a certified copy of which said record and proceedings *have* heretofore been lodged in said Court by the plaintiff in error. Now, therefore,

It is hereby stipulated by and between the parties to the above entitled action that the certified copy of the record and proceedings in the above entitled cause heretofore filed in the Supreme Court of the United States by the plaintiff in error as a part of its petition for a writ of certiorari may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the clerk of the Supreme Court of the State of Vermont, for Windham County, a certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his return to the writ of certiorari issued out of the Supreme Court of the United States on the 20th day of October, 1920.

Dated October 28th, 1921.

MELVILLE P. MAURICE,
Attorney for Plaintiff in Error.
ERNEST W. GIBSON,
Attorney for Defendant in Error.

[Seal of Supreme Court, Windham County, Vermont.]

[Seal of Windham County, Vermont.]

Copy.

[Endorsed:] File No. 28,381. Supreme Court of the United States. No. 426. October Term, 1921. Champlain Realty Company, Plaintiff, vs. The Town of Brattleboro, Defendant. Certiorari

to the Supreme Court of the State of Vermont. Stipulation of Counsel Relative to Return to Writ of Certiorari. William C. Cannon, Attorney for Plaintiff, Address: 15 Broad Street, New York City. Ernest W. Gibson, Attorney for Defendant, Address: Brattleboro, Vermont. Filed Oct. 31, '21. Wm. R. Daley, Clerk. Law offices Harvey, Maurice & Fitts, Brattleboro, Vt.

STATE OF VERMONT,
Windham County, ss:

I, Wm. R. Daley, Clerk of the County of Windham and Clerk of the County Court and Supreme Court within and for said County, the same being a Court of Record, and having a seal, hereto attached, do hereby certify that the within and foregoing is a true copy of the original Stipulation of Counsel Relative to Return to Writ of Certiorari, in the cause of Champlain Realty Company, Plaintiff, vs. The Town of Brattleboro, as the same now appears on file and record in the office of the Clerk of said Court.

In testimony whereof, I have hereunto subscribed my official signature, and affixed the seal of said Court, at Brattleboro, in said County of Windham, this 31st day of October A. D. 1921.

[Seal of Supreme Court, Windham County, Vermont.]

[Seal of Windham County, Vermont.]

WM. R. DALEY,
Clerk.

File No. 28,381.

Supreme Court of the United States, October Term, 1921.

No. 426.

CHAMPLAIN REALTY COMPANY, Plaintiff,

vs.

THE TOWN OF BRATTLEBORO, Defendant.

Certiorari to the Supreme Court of the State of Vermont.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the Supreme Court of the State of Vermont, I, William R. Daley, as Clerk of said Court for the County of Windham, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the Supreme Court of the State of Vermont, commanding them to send without delay, to the said Supreme Court the record and proceedings in the above entitled cause do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel

Relative to Return to Writ of Certiorari," in which stipulation it is provided that the certified transcript of the record and proceedings heretofore filed by the plaintiff in error in said cause in said Supreme Court with its petition for a writ of certiorari may be taken as the return to the said writ of cetriorari, the original of which stipulation was filed in my office on this 31st day of October, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Vermont, at Brattleboro in the County of Windham and State of Vermont, this 31st of October A. D. 1921.

[Seal of Supreme Court, Windham County, Vermont.]

[Seal of Windham County, Vermont.]

WM. R. DALEY,
Clerk of the Supreme Court of
Vermont for Windham County.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Vermont, Greeting:

Being informed that there is now pending before you a suit in which The Town of Brattleboro is appellant, and Champlain Realty Company is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Windham County Court, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twentieth day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,381. Supreme Court of the United States, No. 426, October Term, 1921. Champlain Realty Company vs. The Town of Brattleboro. Writ of Certiorari.

[Endorsed:] File No. 28,381. Supreme Court U. S. October Term, 1921. Term No. 426. Champlain Realty Co., Petitioner, vs. Town of Brattleboro. Writ of Certiorari, and Return. Filed Nov. 2, 1921.

No. 128

FILED
JUL 23 1921
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

PETITION AND MOTION, WITH NOTICE, FOR WRIT OF CERTIORARI TO THE SUPREME COURT WITHIN AND FOR THE STATE OF VERMONT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. CANNON,
Attorney for Petitioner,
15 Broad Street,
New York City.

Notice of Motion.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

Town of Brattleboro, respondent, is hereby notified that Champlain Realty Company, petitioner, will on the 3rd day of October, 1921, upon its petition and a copy of the entire record in the case, upon the opening of Court on that day, or as soon thereafter as counsel can be heard, submit a motion, copy of which and of the petition for writ of certiorari and brief in support thereof is herewith delivered to you, to the Supreme Court of the United States in its Court Room at the Capitol in the City of Washington, D. C.

WILLIAM C. CANNON,
Counsel for Petitioner.

Notice of Petition.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

Comes now Champlain Realty Company by William C. Cannon, its counsel, and moves this Honorable Court that it shall, upon certiorari or other proper process directed to the Honorable Judges of the Supreme Court within and for the State of Vermont, require said Court to certify to this Court for its review and determination, a certain cause in said Supreme Court within and for the State of Vermont lately pending wherein the respondent, Town of Brattleboro, was defendant, and your petitioner, Champlain Realty Company, was plaintiff, and to that end it now tenders herewith its petition and brief and a certified copy of the entire record in said cause in said Supreme Court in and for the State of Vermont.

WILLIAM C. CANNON,
Counsel for Petitioner.

Petition for Certiorari.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

To the Honorable Supreme Court of the United States:

The petition of Champlain Realty Company respectfully shows to this Honorable Court as follows:

Your petitioner brought this action to recover the taxes assessed by the respondent in the year 1919 upon certain pulp wood belonging to the petitioner. This pulp wood was at the time of such tax assessment in the course of interstate transportation from a point in the State of Vermont outside the limits of the respondent town and quite remote therefrom, to the petitioner's mill in the State of New Hampshire, and was temporarily detained in the West River in said town of Brattleboro, Vermont, by reason of high water in the Connecticut River which rendered further transportation unsafe until that river had subsided. The petitioner paid said taxes under

protest and then brought this action for their recovery on the ground that this pulp wood was in the course of interstate transportation at the time of the assessment and thereby, under the Constitution and laws of the United States, exempt from taxation by the respondent town. This was the only question involved and the case was decided solely upon this federal question.

Under the laws of the State of Vermont, in which said town of Brattleboro is situated, payment of such taxes under protest followed by suit for their recovery is the proper and legal method of attacking the legality and validity of their assessment.

National Metal Edge Box Company vs. *Town of Readsboro,* 111 Atl. Rep. 386.

This suit was brought in the County Court for the County of Windham in the State of Vermont, said court being a court of competent jurisdiction to hear and determine said cause, and the said parties having appeared, and the same having been duly tried by said court, judgment was rendered in favor of the petitioner herein, on the ground that the property taxed was at the time of its assessment actually in the course of interstate transportation and thereby under the Constitution and laws of the United States exempt from tax by the Town of Brattleboro.

The respondent appealed to the Supreme Court of the State of Vermont, by which said appeal was duly heard, and thereupon said Supreme

Court of the State of Vermont reversed the judgment of the County Court for the County of Windham, and rendered final judgment in favor of the respondent on the ground that the property taxed was not at the time of its assessment actually in the course of interstate transportation and therefore was not exempt from tax by the Town of Brattleboro under the Constitution and laws of the United States.

The facts as found by the Trial Court in its findings of fact which were conclusive upon the Supreme Court of the State of Vermont, and upon which said final judgment was rendered, are briefly as follows:

The petitioner for several years prior to the assessment of the taxes in question had been accustomed to transport its pulp wood from the headwaters of the West River in Vermont, where the wood was cut, to its mill at Hinsdale, New Hampshire, by logging the same down the West River to the Connecticut River and thence down the Connecticut River to Hinsdale, New Hampshire. The West River is in Vermont and empties into the Connecticut River in the town of Brattleboro, Vermont, and from that point the Connecticut River is in the State of New Hampshire. The pulp wood in question was cut near the headwaters of the West River during the winter of 1918-1919, and placed upon the banks of that river and its tributaries quite remote from the limits of the town of Brattleboro. About March 25, 1919, your petitioner commenced the transpor-

tation of this pulp wood to its mill in Hinsdale, by logging the same down the West River and thence down the Connecticut River to the latter place, the first of the pulp wood reaching the mouth of the West River at Brattleboro on March 27, 1919. It was then found that the waters of the Connecticut River were so high as to render further transportation of said pulp wood unsafe until the waters had subsided, and the pulp wood was therefore held temporarily in a boom at the mouth of the West River and within the limits of the town of Brattleboro for a few days, until the waters of the Connecticut River had subsided sufficiently to render it safe to continue its transportation. On April 1st, while there detained, the pulp wood was assessed by the town of Brattleboro, for the taxes in question. On April 3rd, the Connecticut River had subsided sufficiently to make it possible to continue the transportation of the pulp wood which was accordingly released on that day and floated down the Connecticut River to the petitioner's mill at Hinsdale, New Hampshire, its destination.

The petitioner submits that the foregoing facts establish that the pulp wood in question was in the actual course of interstate transportation at the time it was assessed for the taxes sought to be recovered, and that under the Constitution and laws of the United States, it was therefore exempt from taxation by the town of Brattleboro.

The decision of this Honorable Court in the case of *Coe* vs. *Errol*, 116 U. S. 517, and the prin-

ciples laid down in that case and in the cases of *Kelley* vs. *Rhoads,* 188 U. S. 1, and *Bacon* vs. *Illinois,* 227 U. S. 504, seem to your petitioner to be decisive upon this subject. The pulp wood in this case was in exactly the same position as the logs in the case of *Coe* vs. *Errol,* which were being shipped from the State of Maine to the State of New Hampshire and which this Honorable Court held in that case, affirming the judgment of the New Hampshire Supreme Court, were exempt from local tax in New Hampshire, while temporarily detained in that State by low water. It had started on its interstate transportation and was detained at Brattleboro solely because of the imposibility of continuing its safe transportation immediately, by reason of natural causes over which the petitioner had no control. Its situation was quite different from that of the other logs referred to in *Coe* vs. *Errol,* which had been collected at the point of detention for the purpose of subsequently starting them on their interstate transportation, and which the Court held in that case were therefore not exempt from local taxation.

Your petitioner respectfully submits that the decision and judgment of the Supreme Court of the State of Vermont is in direct conflict with the decisions of this Honorable Court in the cases above referred to.

Your petitioner submits that the question involved is one of national importance. Logging operations on a most extensive scale are car-

ried on not only upon the rivers of the State of New Hampshire, but also on rivers throughout the United States, and such rivers form a very usual and customary means of interstate transportation in all kinds of commodities. If such property, while engaged in interstate commerce, is to be subject to taxation by every town or taxing district through which it passes, if temporarily detained there by unavoidable causes at the time taxes are assessed for that particular locality, then the burden imposed upon interstate commerce will become a very great and serious one.

Indeed the principle involved affects every kind of interstate transportation. Property detained in freight cars on sidings, property in boats detained at their wharves, property in trucks delayed on their journey, might all, although in course of interstate transportation, be subject to local tax if the detention occurred in a local tax district on the date when the tax assessment was made for that locality.

Your petitioner therefore submits that this is a cause wherein a final judgment or decree has been rendered or passed by the highest court of the State of Vermont in which a decision could be had, where the petitioner claimed a right, privilege and immunity under the Constitution and laws of the United States, and the decision was against the right, privilege and immunity so claimed; that the decision and final judgment of the Supreme Court of the State of Vermont is in direct conflict with the decisions of this Honorable Court; and that

under the provisions of Section 237 of the Judicial Code, as amended in 1916, this case is therefore one in which the final judgment of the Supreme Court of Vermont should be reviewed by this Court by writ of certiorari.

As this Court said in the recent case of *Ward* vs. *Commissioners of Love County*, 253 U. S. 17, 22, in connection with a motion to dismiss the writ of certiorari granted in that case for the review of a judgment of the Supreme Court of Oklahoma sustaining the tax therein sought to be recovered and which the petitioner claimed was assessed upon property which under the Constitution and laws of the United States was exempt from taxation.

> "The right to the exemption was a federal right and was specially set up and claimed as such in the petition. Whether the right was denied or not given due recognition by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment and this they have done in the appropriate way."

CHAMPLAIN REALTY COMPANY,
By
WILLIAM C. CANNON,
Its Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

BRIEF ON BEHALF OF CHAMPLAIN REALTY COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT WITHIN AND FOR THE STATE OF VERMONT.

Statement.

This cause is one general assumpsit, with specifications thereunder seeking to recover from the Town of Brattleboro certain taxes paid by the petitioner to said Town upon the grand list of said Town for the year 1919, and which are claimed by the petitioner to have been illegally assessed by the officer of said Town of Brattleboro. The case was tried by the Court, and findings of fact were made by said trial court which appear in the record. Upon these findings of fact the trial court rendered judgment for the plaintiff for the

amount of its specifications, and upon consideration of these same findings of fact the Supreme Court of the State of Vermont reversed the decision of the trial court and rendered judgment for the defendant to recover its costs.

As shown by the findings of fact, the petitioner, a corporation duly licensed to do business in the State of Vermont, cut from its lands in the western part of Windham County and the northeastern part of Bennington County, Vermont, the pulp wood in question in this case during the winter of 1918-19. This pulp wood was gathered together by the petitioner upon the head waters of the West River, which river flows through various towns in Windham County on an easterly course, emptying into the Connecticut River in the Village of Brattleboro. All this pulp wood was driven by the employees of the petitioner down the West River in the Spring of 1919, destined for its rossing and bolting mill at Hinsdale, New Hampshire, the transportation being wholly by water down the West River to the Connecticut River, thence down the Connecticut River to the said mill, which is located in the State of New Hampshire a few miles below the Village of Brattleboro. The findings of fact show that the West River and its tributaries are all within the State of Vermont, and that the Connecticut River from the point where the West River empties into the Connecticut River, flows in the State of New Hampshire. The findings of fact further show that all this pulp wood was destined to be driven to Hinsdale, New Hampshire, to the mill of the petitioner at that point. The findings of fact

further show that the petitioner maintained at its mill at Hinsdale, New Hampshire, for the purpose of holding this wood at the mill, a single log boom, such as is usually used in the construction of booms, and that when the water in the Connecticut River was high and the current swift this boom at Hinsdale would not always hold the wood floated down the river, and the wood would be carried over or drawn under the boom because of high water and swift current and carried down the river and lost. The petitioner maintained a boom near the mouth of the West River in the Town of Brattleboro for the purpose of holding and controlling the logs driven down the West River when the water in the Connecticut River was too high to allow the wood to be safely floated into the Connecticut River and down that river to the petitioner's mill at Hinsdale. The wood was placed in the West River beginning on March 25, 1919, and the first of the wood reached the boom at the mouth of the West River on March 27, 1919. At that time the Connecticut River was so high and its current so swift that it was not thought safe to allow the wood to be floated through into the Connecticut River, and the current was so swift with debris and floating ice running in the river that the Connecticut River was not then drivable, and wood of this character could not be safely held at Hinsdale, New Hampshire. On the 28th day of March, 1919, the boom at the mouth of the West River broke, allowing about Two Thousand (2000) cords of wood to escape into the Connecticut River, Five Hundred (500) cords of this wood going over or under the boom at

Hinsdale and on down the Connecticut River. The Connecticut River became drivable on April 3rd and on this date the plaintiff's agents and workmen cut the boom at the mouth of the West River and allowed the wood to pass into the Connecticut River uninterruptedly on its journey to Hinsdale. The wood was held at Brattleboro for no other purpose than to await the Connecticut River becoming drivable. On March 29, the West River was frozen and the wood could not go into the Connecticut River because of the ice in the river, and could not have continued its journey into the Connecticut River at that time. The Connecticut River was not suitable for driving and holding the pulp wood after the drive commenced on March 25 until April 3rd. The drive was in continuous operation from March 25 until it was completed on May 9, and was conducted properly to make an uninterrupted passage so far as possible. The petitioner filed a tax inventory at the request of the Listers of the Town of Brattleboro in which it claimed that this pulp wood was not taxable by the Town of Brattleboro as it was wood in transit in interstate commerce. The respondent town ignored the claims of the petitioner and assessed a tax on this wood against the petitioner amounting to Four Hundred Eighty-four Dollars and Fifty Cents ($484.50), which is the tax sought to be recovered by the petitioner in this action.

The following significant findings of fact are directly applicable to the law governing the decision of this case:

1. The wood was destined for shipment by water from the head waters of the West River in

Vermont down said West River to the Connecticut River in New Hampshire and down the Connecticut River to the petitioner's mill at Hinsdale, New Hampshire.

2. Up to April 3, 1919, the Connecticut River, on account of debris, floating ice and the swift current, was not drivable for wood of this character and such wood could not be safely held at Hinsdale, New Hampshire.

3. The wood was not held at Brattleboro for any other purpose except to prevent its loss on account of the high water, floating ice and debris in the Connecticut River.

4. The drive of the pulp wood by the petitioner was in continuous operation from March 25 until it was completed on May 9, and was conducted properly to make an uninterrupted passage so far as possible.

5. One thousand (1,000) cords of this wood were on the Retreat Meadow, where they had been floated by the water of the West River, and this wood could not be continued on its journey until boomed or warped out into the stream.

The Supreme Court of Vermont decided this case wholly upon the federal question presented, as shown by the opinion and the Court states in the opinion, "As the case presents a federal question, it is controlled by principles to be found in the decisions of the Supreme Court of the United States."

FIRST POINT.

The payment of an illegal tax under protest, and a suit in general assumpsit, with specifications, to recover back this tax, is the well settled remedy in Vermont.

This has been settled in Vermont for years.

National Metal Edge Box Co. v. *Town of Readsboro,* Vol. 111, Atlantic Reporter, page 386.

SECOND POINT.

The findings of fact of the Windham County Court are the basis of the judgment in the Windham County Court and of the judgment in the Supreme Court of Vermont, and are conclusive in the Supreme Court of Vermont and here.

This is supported by the uniform decisions for many years of the Supreme Court of Vermont.

West River Bank v. *Gale,* 42 Vt. 27, at p. 34.

Roberts v. *Welch,* 46 Vt. 164, at pp. 169-170.

Murdock, Admr. v. *Hicks,* 50 Vt. 683, at p. 687.

Foster's Admr. v. *Burton,* 62 Vt. 239, at p. 241.

Parsons v. *Parsons,* 68 Vt. 95, at p. 96.
Hyde Park Lumber Co. v. *Shepardson,* 72 Vt. 188, at p. 189.
Coolidge v. *Taylor,* 79 Vt. 528, at p. 532.
Lathrop v. *Levarn,* 83 Vt. 1, at p. 6.

THIRD POINT.

The wood was in interstate transportation at the time of the attempted taxation by the Town of Brattleboro, and was exempt from taxation by said town.

(a) Whenever a commodity has began to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.

12 Corpus Juris, 98, and cases cited.

(b) When these goods had been started upon transportation in a continuous route or journey to another state, the wood ceased to be a part of the general mass of property in the state, and was not subject to local taxation.

Coe v. *Errol,* 116 U. S. 517, 525, 29 L. ed. 715, 719.
Diamond Match Co. v. *Ontonagon,* 188 U. S. 82, 47 L. ed. 394.

FOURTH POINT.

The decision of the Supreme Court of Vermont is erroneous and contrary to the findings of fact.

The decision of the Supreme Court of Vermont is based upon its claim that this wood was detained at Brattleboro for the convenience and benefit of the petitioner.

Instead of being held for the convenience of the petitioner, it was held on account of the necessity of the petitioner caused by the high waters of the Connecticut River. The finding of the Court upon this point is conclusive, and was conclusive upon the Supreme Court of Vermont.

The Court in its findings of fact says, referring to March 29th, when the wood reached the Connecticut River, "The Connecticut was then too high to be drivable, and continued in that condition until April 3rd, and on that later date the plaintiff's agents and workmen cut the boom at the mouth of the West River so that the wood could pass into the Connecticut River."

The findings further show that on March 28th, 1919, the boom broke, allowing two thousand (2000) cords of this wood to go into the Connecticut River, and that five hundred (500) cords of the wood went over and under the boom at Hinsdale and on down the Connecticut River, but that it was saved at points below and brought back. On account of these findings, it conclusively appears that to have continued the drive down

the West River and Connecticut River without waiting until the Connecticut River was drivable would have caused the loss and destruction of the plaintiff's property.

The Supreme Court of Vermont was again in error in its holding that the boom at Brattleboro was a place where the products of the State were gathered together, and that it could not have intended that any of it was to move out of the State until such time as the petitioner should see fit to send it on its way.

The Supreme Court of Vermont was bound by the findings, and the findings show the wood was held until such time only as it might be safe to allow the wood to float into the Connecticut River, and that it was not held there for any other purpose.

FIFTH POINT.

The Supreme Court of Vermont made an erroneous application of the law to the facts found.

The law is laid down in

Coe v. *Errol,* 116 U. S. 517.
Kelly v. *Rhoads,* 188 U. S. 1.
Brown v. *Houston,* 114 U. S. 622.
Pittsburgh, etc. Coal Co. v. *Bates,* 156 U. S. 577.
Diamond Match Co. v. *Ontonagon,* supra.

The Vermont court overlooks the fact that a detention by high water is just as much a detention by natural causes as the detention by low water referred to in *Coe* vs. *Errol,* supra.

The situation here is similar to that in *Kelly* v. *Ahoads, supra.* In that case, the sheep consumed six to eight weeks in travelling about five hundred miles and were allowed to spread out for grazing as they crossed the state. These sheep must necessarily have stopped to rest, and their stopping was solely for the purpose of preventing their injury or death by over-driving. Stopping the sheep while they were being driven across the state as described in that case, was just as much an interruption of their interstate journey as was the stopping of the logs because the Connecticut River was not drivable, and for the same reason, namely, the necessity of the owner in order to prevent the loss and destruction of the property

If the wood had been started by teams and wagons, on the highway from the towns where it was cut, to Hinsdale, New Hampshire, and had arrived at Brattleboro on March 29th, and the highway had been covered by the flood waters of the Connecticut River so that to enter therein would cause the loss of the property, and these teams transporting the wood had been delayed by the flood until April 3rd, such interruption would be the same as the interruption described in the findings of fact. It would be the same as the interruption caused by the low water in *Coe* v. *Errol,* and on the authority of that case the wood would be exempt from taxation.

CONCLUSION.

From the well settled law applied to the facts as found, this wood was exempt from taxation in the Town of Brattleboro, because it commenced its interstate journey when it was deposited in the West River at its head waters from the places where it had been gathered together from the various towns. These points where the wood was gathered together at the head waters of the West River were the entrepot from which the interstate journey started, as is apparent from the findings of fact, and the detention at Brattleboro was on account of the necessity of your petitioner and to prevent the loss of its goods, instead of for its benefit and convenience.

It is respectfully submitted that the petition for writ of certiorari to the Supreme Court within and for the State of Vermont should be granted.

Respectfully submitted,

WILLIAM C. CANNON,
Counsel for Petitioner.

No. 426 128

Supreme Court of the United States,

OCTOBER TERM, 1921.

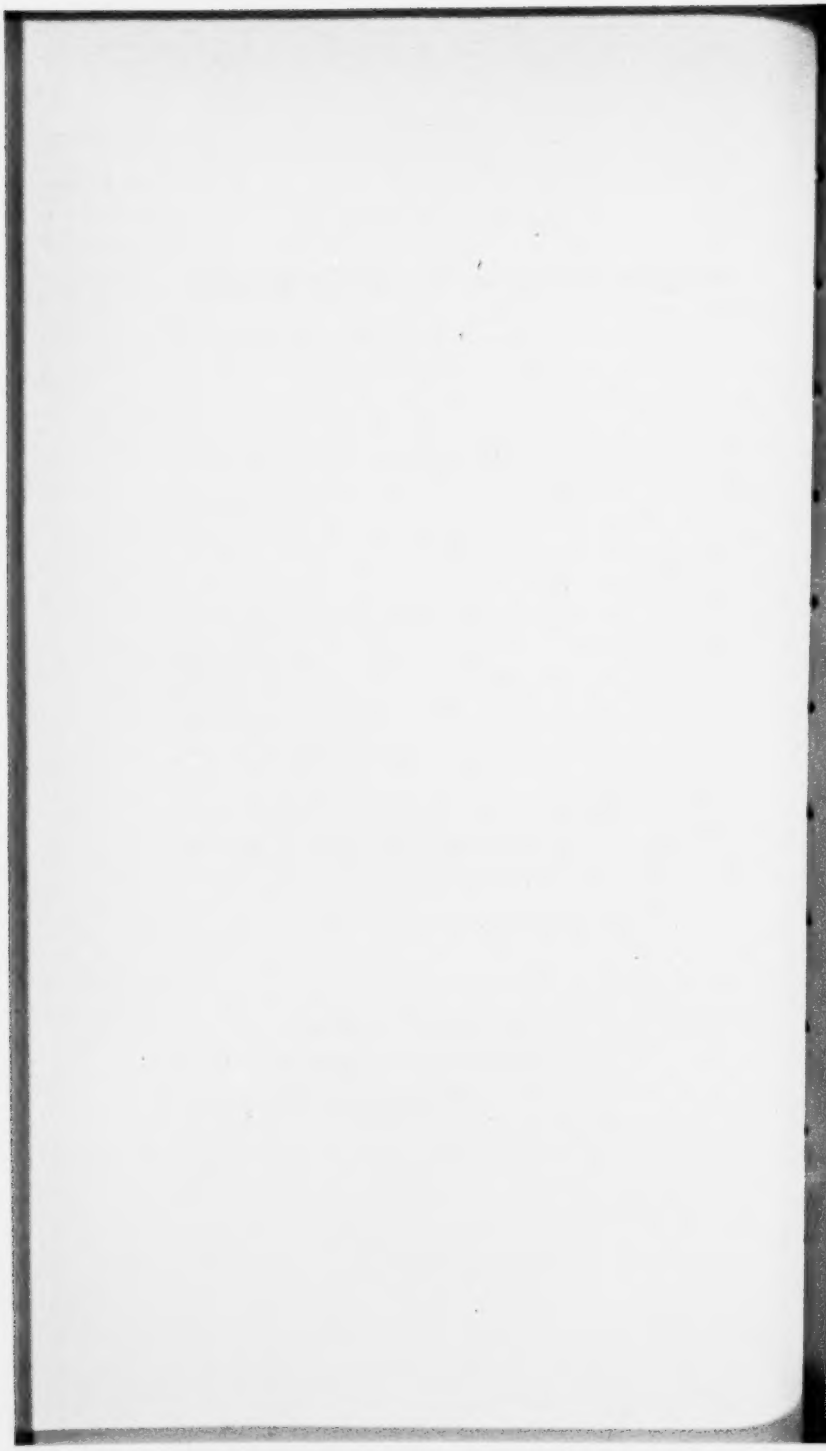
CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

RESPONDENT'S BRIEF ON THE SUBJECT OF THE PETITIONER'S MOTION FOR WRIT OF CERTIORARI.

ERNEST W. GIBSON,
Attorney for Respondent,
Brattleboro, Vermont.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,
against
TOWN OF BRATTLEBORO,
Respondent.

BRIEF ON BEHALF OF RESPONDENT OPPOSING THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT WITHIN AND FOR THE STATE OF VERMONT.

Statement.

The action in the Court below is general assumpsit to recover $484.50 in taxes assessed by the respondent, herein, against the petitioner, on 1500 cords of pulp wood, which taxes the petitioner claims to have paid under protest. "The only objection to the validity of the tax was and is that the pulp wood for which the plaintiff was taxed, was, on April 1, 1919 (the date of assessment), in transit in interstate commerce and so outside the taxing power of the State." As bear-

ing upon this question the Court found the following facts: "During the winter of 1918-19, the petitioner cut pulp wood, in all about 10,000 cords, in the towns of Jamaica, Stratton, Londonderry, and Winhall in the State of Vermont. The petitioner maintains a mill at Hinsdale in the State of New Hampshire, about three miles below Brattleboro, where its pulp wood is rossed and bolted. The wood, cut four feet long, was placed upon the banks of West River and its tributaries to be floated down into the Connecticut and thence to its destination at the mill in Hinsdale. The waters of the West River are wholly in the State of Vermont and empty in the town of Brattleboro into the Connecticut. West River and its tributaries had been used for driving pulp wood to the mill at Hinsdale in the years 1917 and 1918. A single log boom is provided at the (Hinsdale) mill to receive the wood floated down the river, but is incapable of holding it all when the water in the Connecticut is high and the current swift, and the wood is liable to be carried over and drawn under the boom and lost. A pond of considerable size is formed near the mouth of the West River in the town of Brattleboro by water set back from the Connecticut by the dam at Vernon. Petitioner maintains a boom at this point to hold and control the logs driven down West River until the water in the Connecticut has receded sufficiently to permit of their being held in the boom at Hinsdale."

"On March 25, 1919, the plaintiff began putting the pulp wood into the West River and its tributaries, the water in these streams then being high, intending to drive it down the river and thence into the Connecticut and down that river to its mill in Hinsdale. In anticipation of probable high water in the Connecticut, petitioner had previously placed its boom across West River near its mouth to hold the wood there until the water in the Connecticut had receded enough to allow it to be held at the mill at Hinsdale. The wood floated down the West River on the high water and the head of the drive reached the boom at the mouth of West River on March 27, 1919. At that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood into that river as it could not be held at the Hinsdale boom. For this reason and no other the plaintiff held its wood in the boom at Brattleboro. The Connecticut was not suitable for driving pulp wood from the time the drive began until April 3, on which date the plaintiff's servants cut the boom at the mouth of the West River so that the wood could pass into the Connecticut. Prior to April 3, only about 4000 cords of the wood had reached and been held at the West River boom. The balance arriving later went through to Hinsdale without stopping. On March 28, 1919, when there was by estimation about 4000 cords of wood in the West River boom, it broke, allowing some of the wood to

escape into the Connecticut and on to the Retreat meadow in Brattleboro near the mouth of West River. The boom was repaired on March 29, 1919. At this time the part of West River where the wood lay back of the boom, called the holding ground, was frozen, so the wood if not boomed could not have continued on its journey into the Connecticut at that time. On April 1, 1919, about 1500 cords of the pulp wood was being held in petitioner's boom at the mouth of West River. Some wood that was lodged on an island and the wood on the Retreat meadow remained after the boom was cut. The latter remained on the meadow about two weeks and had to be taken out by a process called 'booming' or 'warping.' None of this 1500 cords was cut in the town of Brattleboro. All of it had been carried down West River and was destined for the petitioner's mill at Hinsdale, N. H., by way of the Connecticut."

The pulp wood in question "was being transported by the petitioner, its owner, and was subject at all times to its complete control."

On April 1, 1919, the pulp wood "was then at rest in the boom at Brattleboro for a time necessarily indefinite and for a purpose beneficial to the plaintiff." "The immediate destination of this wood and the some 2500 cords that escaped into the Connecticut when the boom broke, was the so-called 'holding ground' at the mouth of West River, although its ultimate destination was

Hinsdale, N. H." "It was at rest" in the State of Vermont "awaiting the voluntary act of the petitioner that should start it on its ultimate journey out of the state."

"It was fully in the plaintiff's control and could be exported or not as it should see fit."

"The wood with which we are now concerned did not start on its final movement—its ultimate passage—out of the state in a continuous journey until released from the boom at Brattleboro."

"So far as this wood was concerned when it started on the drive, the route out of the state was not available—a fact well known to the plaintiff."

"The wood started down the West River and its tributaries before the Connecticut River was drivable to take advantage of the high water without which West River could not be driven."

"For its own purposes the petitioner maintained the boom at Brattleboro as a facility for retaining control of the pulp wood until it would be to its advantage to send it on out of the state." "The movement down West River to the boom was merely preparatory to its ultimate journey out of the state."

The foregoing facts are all found in the opinion of Taylor, J., which was concurred in by all of the justices of the Vermont Supreme Court, printed on pages 38-51 of the Transcript of Record herein, and particularly on pages 39, 40, and 50 of said record.

Argument.

An inspection of the "Transcript of Record," furnished by the petitioner herein, will show that there were several questions, aside from the federal question involved, briefed and argued by the parties when the case was before the Vermont Supreme Court, and that Court had the aid and advantage of a complete transcript of the record of the case as it was presented to the trial court below, including a complete transcript of all the evidence in the case, in view of which the statements of facts as they appear from the opinion of the State Supreme Court should be given full weight and in fact are controlling.

The petition for writ of certiorari should be denied because it in effect asks this court to review questions of fact and not questions of law.

The Supreme Court of Vermont has found the fact to be that "The wood with which we are now concerned did not start on its final movement—its ultimate passage out of the state in a continuous journey until released from the boom at Brattleboro." Page 50, line 31, Transcript of Record. In other words the interstate journey did not begin until the wood left the boom at Brattleboro. This was subsequent to the assessment of the tax in question.

The granting of a writ of certiorari being a matter of judicial discretion, and not a matter of right, the court should not grant the writ unless it is made affirmatively to appear that the rights

of the petitioner have been infringed or abridged, and no such showing has been made in the case at bar.

The decision of the Court below, which is sought to be reviewed, does not reverse in any way the principles heretofore laid down by this Court in connection with the commerce clause of the Federal Constitution but in fact affirms the well-established principle that "property actually in transit from one state to another is exempt from local taxation as an unlawful interference with interstate commerce," but that "the state has undoubted power to tax its own products while within its jurisdiction, though intended for exportation, if taxed as part of the general mass of property in the State, unless and until such products have become the subject of interstate commerce." The Court below applies the law to the facts established in the case at bar and cites in support of its decision the well-considered cases of Coe vs. Errol, 116 U. S. 517; Diamond Match Co. vs. Village of Ontonagon, 188 U. S. 82; Kelley vs. Rhoades, 188 U. S. 1; Brown vs. Houston, 114 U. S. 622; Pittsburg, etc. Coal Co. vs. Bates, 156 U. S. 577; Bacon vs. Illinois, 227 U. S. 504; General Oil Co. vs. Crain, 209 U. S. 211; Susquehanna Coal Co. vs. So. Amboy, 228 U. S. 665.

There being no conflict as to the principles of law involved in this case this Court in the exercise of its sound judicial discretion should dismiss the petition here pending and not subject the re-

spondents to the delay and expense of a rehearing of this case on certiorari.

The writ should not be granted because the only federal question raised has been so explicitly decided by this Court in accordance with the ruling of the lower Court as to preclude further argument on the subject. See Equitable Life Assur. Soc. vs. Brown (1902), 23 Sup. Ct. 123, 125; 187 U. S. 308.

The respondent respectfully submits that the petition for writ of certiorari to the Supreme Court within and for the State of Vermont should be denied.

Respectfully submitted,

ERNEST W. GIBSON,
Counsel for Respondent.

Case No. 126
(28,531)

Supreme Court of the United States.

October Term, 1921.

CHAMPLAIN REALTY COMPANY,
Petitioner,

against

TOWN OF BRATTLEBORO,
Respondent.

BRIEF ON BEHALF OF CHAMPLAIN REALTY COMPANY, PETITIONER.

Melville P. Maurice,
102 Main Street,
Brattleboro, Vermont.

William C. Cannon,
Theodore W. Morris, Jr.,
15 Broad Street,
New York City,
Counsel for Petitioner.

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CASES CITED.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 426.

CHAMPLAIN REALTY COMPANY,
Petitioner,
against
TOWN OF BRATTLEBORO,
Respondent.

BRIEF ON BEHALF OF THE CHAMPLAIN REALTY COMPANY, PETITIONER.

STATEMENT.

This is a writ of certiorari to review a judgment of the Supreme Court of the State of Vermont which reversed a judgment of the County Court of Windham County, Vermont, in favor of the petitioner, for the recovery of certain taxes paid by the petitioners under protest to the Town of Brattleboro for the year 1919, and which are

claimed by the petitioner to have been illegally assessed by the officers of said town upon certain pulp wood which at the time was in the course of interstate transportation from the head waters of the West River in the State of Vermont to Hinsdale in the State of New Hampshire. (Transcript of Record, pp. 16, 17, 18.) The action was an action of general assumpsit with specifications thereunder to recover the taxes so paid, and was tried by the Court. (Transcript of Record, pp. 15-19, 39.) The Findings of Fact are conclusive here and the only question involved in this appeal is whether or not upon the facts so found the pulp wood in question was in the course of interstate transportation and therefore exempt from taxation by the Town of Brattleboro at the time said taxes were imposed. In order that the facts may be stated accurately we will quote fully from the Findings of Fact Transcript of Record, pages 16-18 (italics ours):

> "During the winter of 1918 and 1919 the plaintiff cut pulp wood in the towns of Jamaica, Stratton and Londonderry, in Windham County, and Winhall, in Bennington County. The wood was cut four foot long and was placed upon the banks of West River and its tributaries to be floated down said river and into the Connecticut *and thence to its destination at Hinsdale, N. H.,* about three miles below the town of Brattleboro. Said West River and tributaries had been used for driving pulp

wood to Hinsdale, N. H., theretofore, to wit, in 1917 and 1918."

"The aforesaid West River and its tributaries are all within the State of Vermont, and said West River empties into the Connecticut in the town of Brattleboro and from the point where West River empties into the Connecticut the latter river flows in the State of New Hampshire. At Hinsdale the plaintiff maintains a bolting and rossing mill, *and said logs were destined to that mill,* and there the wood was held by means of a single log boom, such as is usually used in the construction of booms and at said mill the wood was rossed and bolted."

"When the water was high in the Connecticut and the current swift the said boom at Hinsdale would not always hold the wood the plaintiff floated down the river, but the wood would be carried over or drawn under the booms because of the high water and swift current and carried down the river and lost."

"The plaintiff maintains a boom near the mouth of West River and in the town of Brattleboro to hold and control the logs driven down that river when the water was too high to safely turn them into the Connecticut. The purpose was to hold the logs there until the water in the Connecticut had receded sufficiently to hold the wood in the boom at Hinsdale."

"The plaintiff put all the pulp wood it had cut in the winter of 1918 and 1919 in the aforesaid towns in the West River Valley, into the West River and its tributaries beginning on March 25, 1919, in all about 10,000 cords, in-

tending as the water was then high to drive it down said West River and thence into the Connecticut River *and down that river to its mill at Hinsdale,* and in anticipation of the probable high water in the Connecticut River it about the middle of March, 1919, placed its boom across West River near its mouth and in the town of Brattleboro for the purpose of holding the wood in the West River until the water in the Connecticut had receded enough to allow the wood to be held on said river at plaintiff's said mill at Hinsdale. The wood floated down West River on the high water and the first of it reached the boom at the mouth of West River on March 27, 1919, *and at that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood flow into the Connecticut, as wood of the character of this wood could not be held by the Hinsdale boom, and therefore the plaintiff held its said wood in the boom at the mouth of said West River in Brattleboro. It was not held there for any other purpose than as aforesaid."*

"On March 28, 1919, the boom near the mouth of West River broke allowing some of the wood held by it to go into the Connecticut and also onto the Retreat meadow near the mouth of said West River. Because of the set back of water caused by the Vernon dam there was formed on said Retreat meadow near the mouth of said West River and southerly therefrom and outside the current of said West River a pond of considerable dimension into which water filled from a set back from the Connecticut. *At the time said boom broke the*

water in the Connecticut was high, and there was debris and floating ice running on it, and the current was so swift that it was not drivable and wood of the character of plaintiff's could not be safely held at Hinsdale. At the time the boom broke as aforesaid there was (the amount as estimated by plaintiff the night before) 4,000 cords of wood held at the boom at the mouth of West River and because of the broken boom 2,000 cords (estimated) went into the Connecticut. 1,500 cords of this wood was held by the boom at Hinsdale and 500 cords went over and under that boom but was saved, a part of it at the Vernon dam and part of it at Turners Falls, Mass., and was hauled back to Hinsdale. The broken boom was repaired March 29, for the purpose of holding the wood until the Connecticut became drivable and safe to hold logs in a boom. *The Connecticut was then too high to be drivable, and continued in that condition until April 3 and on this latter date the plaintiff's agents and workmen cut the boom at the mouth of West River so that the wood could pass into the Connecticut.* At the time the boom was repaired the part of West River where the wood laid, back of the boom, called the holding ground was frozen and the wood could not go out because of the ice in the river. So the wood if not boomed could not have continued on its journey into the Connecticut at that time. The boom at the mouth of West River was not closed again after April 3. *The Connecticut was not suitable for driving and holding pulp wood after this drive began until April 3.* Of the 10,000 cords of wood in this drive only

about 4,000 cords was held by the West River boom which is the so-called head of the drive and the balance later went through to Hinsdale without stopping at the West River boom."

"The morning the boom broke half the wood in the boom or 1,000 cords went into the Retreat meadow and it is an estimate that there were 2,000 cords in all in the boom and on the Retreat meadow on April 1 and 6,000 cords held up back on the West River and on its banks above. Some of this wood so strewn along and on the banks of West River was in the town of Brattleboro."

"The 1,000 cords on the Retreat meadow and some wood lodged on an island remained after the boom was cut. That on the Retreat meadow was taken out by a process called booming or warping about two weeks after it went on there. These logs could not come out unless boomed or warped out."

"The plaintiff's said drive of pulp wood down West River to the Connecticut and thence to its rossing plant at Hinsdale was in continuous operation from March 25, until it was completed on May 9, and was conducted properly to make an uninterrupted passage so far as possible."

"On April 1, 1919, there was held in the plaintiff's boom at the mouth of West River in the town of Brattleboro about 1,500 cords of the aforesaid pulp wood. None of it was cut in the town of Brattleboro. All of it had been carried down West River from points above the town of Brattleboro *and all of it was des-*

tined to the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut River."

"The plaintiff was requested by the listers of Brattleboro to make and file a tax inventory of its property in Brattleboro on April 1, 1919, and such inventory was executed and filed with the proper officials of said town. (Plaintiff's Exhibit 2.) The said tax inventory specified that the Champlain Realty Co. was the owner of 1,500 cords of pulp wood situated in the town of Brattleboro on the West River and its banks but that said pulp wood was not taxable by said town of Brattleboro but was wood in transit in interstate commerce."

"The plaintiff had other property set in the Grand List of Brattleboro for 1919, but the fifteen hundred cords of pulp wood, which plaintiff at all times claimed was not taxable, was appraised at $30,000.00 and the tax assessed thereon and which plaintiff paid under protest was $484.50."

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Vermont erred:

First, in holding that the pulp wood taxed by the Town of Brattleboro was not in the course of interstate transportation while detained in the boom at Brattleboro.

Second, in holding that the pulpwood in question was subject to local taxation by the said Town of Brattleboro.

ARGUMENT.

POINT I.

The wood in question was in interstate transportation at the time of its taxation by the Town of Brattleboro and was exempt from taxation by said Town.

POINT II.

The Findings of Fact of the Windham County Court are the basis of the judgment in the Windham County Court and of the judgment in the Supreme Court of Vermont and are conclusive in the Supreme Court of Vermont and here.

POINT III.

The decision of the Supreme Court of Vermont is erroneous and contrary to the Findings of Fact and contrary to law.

POINT IV.

The payment of an illegal tax under protest and a suit in general assumpsit with specifications to recover back the tax, is the well settled remedy in Vermont for the recovery of taxes so paid.

POINT V.

The judgment of the Supreme Court of the State of Vermont should be reversed.

POINT I.

The wood in question was in interstate transportation at the time of its taxation by the Town of Brattleboro and was exempt from taxation by said Town.

The Findings of Fact clearly establish that when this wood started on its journey from the head waters of the West River in Vermont, its destination was Hinsdale, New Hampshire, and not Brattleboro, Vermont, and that it was the petitioner's intention to float the wood down the West River to the Connecticut River where the West River empties into the Connecticut River at Brattleboro and on down the Connecticut River to petitioner's mill at Hinsdale where it was to be held by means of a log boom until it was rossed. They also establish that this interstate journey was interrupted and the wood detained in the boom at Brattleboro solely because of the undrivable condition of the Connecticut River when the wood arrived there, the waters of the Connecticut being at that time so high and so filled with floating ice and debris, and its current so swift, that the interstate transportation of the wood had to be temporarily interrupted until the Connecticut became drivable. The wood was therefore in the course of interstate transportation and the subject of interstate commerce and its temporary detention in the Town of Brattleboro was a detention of necessity caused by the

condition of the Connecticut River which made it impossible to continue the safe transportation of the wood at the time. It was not detained for the benefit and convenience of the owner in any way.

Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.

12 Corpus Juris, p. 98, and cases cited.

Goods in the course of interstate transportation are not subject to local taxation, nor are they subject to such taxation by reason of an interruption of their interstate journey through natural causes for which the owner is not responsible.

Burlington Lumber Co. vs. Willets, 118 Ill. 559, 9 N. E. 254.
Kelley vs. Rhoads, 188 U. S. 1.
Coe vs. Errol, 116 U. S. 517.
Ogilvie vs. Crawford County, 7 Fed. 745.
Brown County vs. Standard Oil Co., 103 Ind. 302, 2 N. E. 758.

They only become subject to such taxation when held at some point for the convenience of the owner pending their transportation to their ultimate destination.

Coe vs. Errol, 116 U. S. 517.

Diamond Match Co. vs. Village of Ontonagon, 188 U. S. 82.
Brown vs. Houston, 114 U. S. 622.
Pittsburgh, etc., Coal Co. vs. Bates, 156 U. S. 577.

In *Coe vs. Errol,* 116 U. S. 517, the question involved was the right of the Town of Errol, New Hampshire, to tax certain logs while detained in that town. A portion of these logs were being floated from the State of Maine through the State of New Hampshire to their destination at Lewiston, Maine, and were detained in said Town of Errol by reason of low water. The remainder of the logs were being floated from New Hampshire to their destination in Maine and had lain over in Errol since the spring or summer before the taxation according to a custom of the petitioner and his associates to allow the logs which were being transported to their mills to lay over a season, or about a year, at that place until it was convenient for them to use them at their mills in Maine. The Supreme Court of New Hampshire remitted the tax upon the logs which were detained by reason of the low water, but sustained the tax upon the logs detained for the convenience of petitioner, and the judgment of the Supreme Court of New Hampshire was affirmed by this Court.

Referring to the logs detained by low water, the Court says:

"This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution."

In *Kelley vs. Rhoads,* 188 U. S. 1, the question involved was the right of the County of Laramie, State of Wyoming, to tax certain sheep which were being driven and transported through said county and state from the then Territory of Utah to the State of Nebraska. It appeared that in driving sheep it was the practice of the person in charge to permit them to stop and graze from time to time and that this was necessary for their maintenance. The Court held that such interruption of their interstate journey did not subject them to local taxation. Referring to the general principle involved, the Court says at page 5 (italics ours):

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite period during such transit, at least *for other than natural causes or lack of facilities for immediate transportation,* it may be lawfully assessed by the local authorities."

The law is well stated by the Supreme Court of Illinois in the Burlington Lumber Co. case cited (9 N. E. at page 256):

> "It is a plain proposition that property in the course of transportation from one state to another over one of our navigable rivers or over any of the public highways of the country, is not liable to taxation, as it passes over such highway, by the state authorities along the line of such highway, and we think it is equally clear that if property, while in the course of transportation over one of our navigable rivers, should be detained by low water, or ice, or other cause, it would not be liable to be taxed by the authorities where the detention occurred. Any other rule would have a direct tendency to obstruct commerce between the states which of course could not be done under our system of laws."

We respectfully submit that the facts as found by the Trial Court conclusively establish that the wood in question, at the time it was taxed, was in the course of interstate transportation from the State of Vermont to the State of New Hampshire; that its temporary detention in the Town of Brattleboro was due solely to the high water, debris and ice in the Connecticut River, which rendered its further safe transportation at the time impossible; and that the interruption of its interstate journey continued only until it was safe to continue its transportation down the Connecticut River to its destination. From the well-settled law applied to the facts as found, this

wood was exempt from taxation in the Town of Brattleboro, because it commenced its interstate journey when it was deposited in the West River at its head waters from the places where it had been gathered together from the various towns. These points where the wood was gathered together at the head waters of the West River were the entrepot from which the interstate journey started, as is apparent from the Findings of Fact, and the detention at Brattleboro was on account of the necessity of your petitioner and to prevent the loss of its goods, instead of for its benefit and convenience. This wood was in exactly the same position as the logs which had been temporarily detained by low water in the case of *Coe vs. Errol,* and which this court there stated were clearly under the protection of the Constitution and exempt from local taxation while so detained.

POINT II.

The Findings of Fact of the Windham County Court are the basis of the judgment in the Windham County Court and of the judgment in the Supreme Court of Vermont and are conclusive in the Supreme Court of Vermont and here.

In *Barnard vs. Town of Pomfret,* 44 Vt. 527, the court says at page 528, after stating that the practice in this state under proceedings to review a judgment of a county court upon exceptions

taken, is similar to the proceedings upon writ of error:

> "Upon this bill of exceptions, although the whole testimony used in the County Court is referred to and has come here as a part of the exceptions, the Findings of the County Court in matters of fact found there cannot be revised in this Court however erroneous in the opinion of this court those findings might be. Parties have the right to a trial of the facts by jury and might agree to such a trial by the Court. They did agree to a trial by the Court and the result is as conclusive as if it had been reached by trial by jury. The only question reviewable here is whether any error in law produced the result reached or contributed to it or not."

This statement of law is supported by innumerable authorities in that state.

Brown vs. Hull, 16 Vt. 673.

Lyman vs. Tarbell and Trustee, 30 Vt. 463.

Roberts vs. Welch, 40 Vt. 146.

Rixford vs. Mills et als., 49 Vt. 319.

Hyde Park Lumber Co. vs. Shepardson, 72 Vt. 188; 47 Atl. 826.

Nelson vs. Marshall, 77 Vt. 44; 58 Atl. 793.

Lathrop vs. Levarn, 83 Vt. 1; 74 Atl. 331.

Powell vs. Merrill, 92 Vt. 124; 103 Atl. 941.

The Findings of Fact being conclusive upon the Supreme Court of Vermont are likewise conclusive here.

Dower vs. Richards, 151 U. S. 658.
Egan vs. Hart, 165 U. S. 188.

POINT III.

The decision of the Supreme Court of Vermont is erroneous and contrary to the Findings of Fact and contrary to law.

The decision of the Supreme Court of Vermont is based upon the theory that this wood was detained at Brattleboro for the convenience and benefit of the petitioner. This is clearly contrary to the Findings of Fact which establish that the wood was detained solely by reason of the condition of the Connecticut River which made it impossible to log the wood down that river during the period it was so detained.

The Vermont Court overlooks the fact that the detention by high water is just as much a detention by natural causes as the detention by low water referred to in *Coe vs. Errol,* supra.

The situation here is similar to that in *Kelley vs. Rhoads,* supra. In that case sheep consumed from six to eight weeks in traveling about five hundred miles and were allowed to stop and spread out for grazing and rest as they crossed

the state. Such interruption of their interstate journey was an interruption of necessity in order to prevent their injury or death. The interruption in the interstate transportation of these logs while the Connecticut River was not drivable was likewise an interruption of necessity in order to prevent their loss and destruction. The principles enunciated by the Court in that case apply with equal force to the facts in the case at bar.

If the wood had been started by teams and wagons from the towns where it was cut for its destination at Hinsdale, New Hampshire, and upon its arrival at Brattleboro the drivers had found the highway so covered by the flood waters of the Connecticut that further progress was impossible until the flood had subsided, could there be any possible question that such interruption of the journey was due to necessity or that the wood would be exempt from local taxation while so detained? That is exactly the situation presented by the facts in this case except that the wood was being transported by water instead of by teams and wagons when it reached the point where further transportation was for the time rendered impossible by reason of the flood waters of the Connecticut. We think it self-evident that the detention thereby caused was a detention of necessity and that while so detained the wood was protected from local taxation by the provisions of the Constitution of the United States.

The decision of the Supreme Court of Ver-

mont is also based upon the erroneous conception that the interstate transportation of this pulp wood did not commence until it was released from the boom at Brattleboro.

This could only be true if the boom at Brattleboro had been its original destination and it had been held there solely for the convenience of the petitioner. That was the situation in all of the cases cited by the Supreme Court of Vermont in support of its decision.

In *Coe vs. Errol,* 116 U. S. 517, the logs had been collected in the Town of Errol, the place of taxation, to be held there until it suited the owner's convenience to reship them to its mill at such times and in such quantities as it required. They were usually held there about a year for this purpose, and the particular logs taxed had been held there since the spring or summer before the taxation.

In *Diamond Match Co. vs. Village of Ontonagon,* 188 U. S. 82, the logs had been collected at the point of taxation in quantities "largely in excess of what the plaintiff could utilize at any one season at its mill," to be held there and sent on by rail to the plaintiff's mill and manufactured into lumber at the convenience of the plaintiff.

In *Bacon vs. Illinois,* 227 U. S. 504, the grain which was taxed had been purchased while in the course of transportation and was removed from the cars at the point of taxation by the purchaser for the purpose of inspecting, weighing, cleaning,

mixing, etc., for his own convenience under a privilege conferred upon him by his purchase contract, and then transhipped by him.

In *General Oil Co. vs. Crain,* 209 U. S. 211, the oil which was taxed had been shipped to fill orders from various parties in Arkansas, Louisiana and Mississippi and was held at Memphis, Tenn., a distributing point, the place of taxation, until it was properly distributed according to the orders and transhipped.

A similar situation is disclosed in the various State decisions referred to in the opinion.

In all of these cases, therefore, the place of taxation was the point of destination, and at the time of the imposition of the tax the goods were being held there solely for the convenience of the owner.

No such situation is disclosed by the facts in this case. The point of destination of this pulp wood was not the boom at Brattleboro, Vt., but the petitioner's mill at Hinsdale, N. H., and its detention at the boom in Brattleboro was a detention of necessity caused by the condition of the Connecticut River and not in any way for the convenience of the owner. This is clearly established by the Findings of Fact, which are conclusive, and from which we will quote:

> "The wood was cut four foot long and was placed upon the banks of West River and its tributaries to be floated down said river and into the Connecticut *and thence to its destina-*

tion at Hinsdale, N. H., about three miles below the town of Brattleboro. Said West River and tributaries had been used for driving pulp wood to Hinsdale, N. H., theretofore, to wit, in 1917 and 1918."

"The aforesaid West River and its tributaries are all within the State of Vermont, and said West River empties into the Connecticut in the town of Brattleboro and from the point where West River empties into the Connecticut the latter river flows in the State of New Hampshire. At Hinsdale the plaintiff maintains a bolting and rossing mill, *and said logs were destined to that mill,* and there the wood was held by means of a single log boom, such as is usually used in the construction of booms and at said mill the wood was rossed and bolted."

"At Hinsdale the plaintiff maintains a bolting and rossing mill, *and said logs were destined to that mill."*

"The plaintiff put all the pulp wood it had cut in the winter of 1918 and 1919 in the aforesaid towns in the West River Valley into the West River and its tributaries beginning on March 25, 1919, in all about 10,000 cords, *intending as the water was then high to drive it down said West River and thence into the Connecticut River and down that river to its mill at Hinsdale. . . . . "*

"The wood floated down West River in high water and the first of it reached the boom at the mouth of West River on March 27, 1919, *and at that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood flow into the Connecticut,*

as wood of the character of this wood could not be held by the Hinsdale boom and therefore the plaintiff held its said wood in the boom at the mouth of said West River in Brattleboro. It was not held there for any other purpose than as aforesaid. . . . ."

"On March 28, 1919, the boom for the mouth of West River broke allowing some of the wood held by it to go into the Connecticut. . . . ."

"*At the time said boom broke the water in the Connecticut was high and there was debris and floating ice running on it and the current was so swift that it was not drivable and wood of the character of plaintiff's could not be safely held at Hinsdale.*"

"*The Connecticut was then too high to be drivable and continued in that condition until April 3 and on this latter date the plaintiff's agents and workmen cut the boom at the mouth of West River so that the wood could pass into the Connecticut.*"

"*The Connecticut was not suitable for driving and holding pulp wood after this drive began until April 3.*"

"*The plaintiff's said drive of pulp wood down West River to the Connecticut and then to its rossing plant at Hinsdale was in continuous operation from March 25 until it was completed on May 9 and so continued properly to make an uninterrupted passage so far as possible.*"

"On April 1, 1919, there was held in the plaintiff's boom at the mouth of West River in the town of Brattleboro about 1,500 cords of the aforesaid pulp wood. None of it was cut

in the town of Brattleboro. All of it had been carried down West River from points above the town of Brattleboro *and all of it was destined to the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut River.*"

We respectfully submit that these findings conclusively establish that the destination of this pulp wood was the petitioner's mill at Hinsdale, New Hampshire; that it was detained at the boom in Brattleboro by natural causes over which the petitioner had no control and which rendered the immediate continuance of its interstate transportation to the point of destination impossible; that this interruption of its interstate journey continued only until such time as it was possible with safety to continue such interstate journey; and that therefore such pulp wood so detained was exempt from local taxation.

As above stated this pulp wood was in exactly the same position as the logs in *Coe vs. Errol,* which were held to be exempt from local tax by the Supreme Court of New Hampshire because of the fact that they, as distinguished from the other logs involved in that case, were in the actual course of interstate transportation and had been detained in the Town of Errol not for the convenience of the owner but because of the low water in the Connecticut River, which decision was referred to with approval by this Court in its opinion in that case.

POINT IV.

The payment of an illegal tax under protest and a suit in general assumpsit with specifications to recover back the tax, is the well settled remedy in Vermont for the recovery of taxes so paid.

This has been settled in Vermont for years.

National Metal Edge Box Co. vs. Town of Readsboro, 111 Atlantic Rep., p. 386; 94 Vt. 420.

POINT V.

The judgment of the Supreme Court of the State of Vermont should be reversed.

Respectfully submitted,

MELVILLE P. MAURICE,
WILLIAM C. CANNON,
THEODORE W. MORRIS, JR.,
Counsel for Petitioner.

CASE No. 128
(28,381)

Supreme Court of the United States,

OCTOBER TERM, 1921.

CHAMPLAIN REALTY COMPANY,

Petitioner,

against

TOWN OF BRATTLEBORO,

Respondent.

BRIEF ON BEHALF OF TOWN OF BRATTLEBORO, RESPONDENT

ARTHUR P. CARPENTER,
ERNEST W. GIBSON,
Brattleboro, Vermont,
Counsel for Respondent.

SUBJECT INDEX.

CASES CITED.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 426.

CHAMPLAIN REALTY COMPANY,
Petitioner,
against
TOWN OF BRATTLEBORO,
Respondent.

BRIEF ON BEHALF OF THE TOWN OF BRATTLEBORO, RESPONDENT.

STATEMENT.

This action is general assumpsit to recover $484.50 taxes assessed by the respondent, herein, against the petitioner, on 1500 cords of pulp wood, which taxes the petitioner paid under protest. "The only objection to the validity of the

tax was and is that the pulp wood for which the plaintiff was taxed, was, on April 1, 1919 (the date of assessment), in transit in interstate commerce and was outside the taxing power of the state."

The case was first heard by the Windham County Court and upon the facts found judgment entered for the plaintiff. The case went to the Vermont Supreme Court on exceptions, where the judgment of the county court was reversed and judgment entered for the defendant (the respondent herein). The opinion of the Supreme Court was delivered by Taylor, J., and concurred in by the full bench (five Justices sitting). The opinion is printed in the record, pages 38 to 51.

The facts found by the trial court which are material to the issue here are printed on pages 16 (commencing with line 27), 17, and 18 of the record. Some of the general statements in these findings, so far as they are statements of fact, have been construed by the Vermont Supreme Court "in the light of the specific findings as to what actually took place; and when so read there is no inconsistency." The facts as so construed show:

1. "That the pulp wood in question was being transported by the petitioner, its owner, and was subject at all times to its complete control." (Record, p. 40, l. 17, par. 2.)

2. On April 1, 1919, the pulp wood "was then at rest in the boom at Brattleboro for a time

necessarily indefinite and for a purpose beneficial to the plaintiff." (Record, p. 50, l. 13.)

3. "The immediate destination of this wood and the some 2500 cords that escaped into the Connecticut when the boom broke, was the so-called 'holding ground' at the mouth of West River, although its ultimate destination was Hinsdale, N. H." (Record, p. 50, l. 15.)

4. "It was at rest in the state of Vermont awaiting the voluntary act of the petitioner that should start it on its ultimate journey out of the state." (Record, p. 50, l. 26.)

5. "It was fully in the plaintiff's control and could be exported or not as it should see fit." (Record, p. 50, l. 28.)

6. "The wood with which we are now concerned did not start on its final movement—its ultimate passage—out of the state in a continuous journey until released from the boom at Brattleboro. (Record, p. 50, l. 31.)

7. "So far as this wood was concerned when it started on the drive, the route out of the state was not available—a fact well known to the plaintiff." (Record, p. 50, l. 36.)

8. "The wood started down the West River and its tributaries before the Connecticut River was drivable to take advantage of the high water without which West River could not be driven." (Record, p. 50, l. 38.)

9. "For its own purposes the petitioner maintained the boom at Brattleboro as a facility for retaining control of the pulp wood until it would

be to its advantage to send it on out of the state." "The movement down West River to the boom was merely preparatory to its ultimate journey out of the state." (Record, p. 50, l. 42.)

ARGUMENT AND AUTHORITIES.

As to the plaintiff's specification of errors:

Although counsel for plaintiff specify two errors there is really but one issue, namely, Was the pulp wood when taxed by the respondent in the course of "interstate transportation," so as to be within the commerce clause of the federal constitution and thus beyond the taxing power of the state? If it was then in interstate transportation it was not subject to local taxation, but if it was not at the time of assessment in interstate transportation, then it was subject to local taxation in the same way and manner that other property in the state was taxable.

As to point I in plaintiff's brief:

We say the facts clearly establish that the *immediate destination* of the said wood, when it was started from the forest, was the pond behind the boom at the mouth of West River in Brattleboro. The wood was cut in the various towns in the West River Valley, and floated down the tributaries of West River, and said river itself, until it was gathered together in that safe haven,

the pond, caused by the setback of the water of the Connecticut, behind the plaintiff's boom, called the "holding ground." The petitioner's intention to float the wood, at some indefinite time, to its rossing mill at Hinsdale, is wholly immaterial.

The leading case and the one most often quoted on this subject is *Coe vs. Errol,* 116 U. S. 517, and because it is so clearly in point, we ask the indulgence of the court while we quote somewhat at length from that case. The case came up to the Supreme Court of the United States on a writ of error to the Supreme Court of the state of New Hampshire on plaintiff's petition for the abatement of taxes. The facts show that the taxes were assessed on certain logs owned by the plaintiff and others lying in the town of Errol on the date of the annual appraisal for taxation, ready to be floated down the Androscoggin River to Lewiston, Me., to be manufactured and sold. Part of the logs had been cut in the state of Maine and were on their way to being floated to Lewiston but were detained in the town of Errol by low water. Part of the logs had been drawn the winter before but from a neighboring town in New Hampshire and placed in Clear Stream and on its banks in the town of Errol to be floated down the Androscoggin River. The selectmen of Errol appraised all of the logs for taxation and assessed the usual taxes thereon. Plaintiff claimed that none of the logs were subject to taxation in Errol for the reason that they

were in transit to market from one state to another. The Supreme Court of New Hampshire abated the portion of the tax assessed upon the logs cut in Maine and sustained the assessment upon those cut in New Hampshire. Mr. Justice Bradley speaking for this court said, at p. 524, that "The question for consideration was whether the products of a state, although intended for exportation to another state and partially prepared for that purpose by being deposited at a place or port of shipment within the state, were liable to be taxed like other property within the state."

The argument of the court which follows is very pertinent to the question under consideration in this case, at p. 525, "There must be a point of time when they (goods intended for transportation out of the state) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destina-

tion, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state. . . . If such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as a part of the general mass of property in the state, at the regular period of assessment for such property and in the usual manner, they not being in the course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment we do not see why the assessment may not be valid and binding. . . . No definite rule has been adopted

with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes. Some of the Western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern states. Certainly, as long as these products are on the lands which produced them, they are a part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it is said in the case of The Daniel Ball, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade

from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing. . . . The logs which were taxed, and the tax which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the state of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewis-

ton in the state of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable."

Other cases in point decided by this court are:

Diamond Match Co. vs. Ontonagon, 188 U. S. 82.
Bacon vs. Illinois, 227 U. S. 504.
General Oil Co. vs. Crain, 209 U. S. 211.
Susquehanna Coal Co. vs. So. Amboy, 228 U. S. 665.

See also *Burlington Lumber Company vs. Willetts*, 118 Ill. 559.
Prairie Oil & Gas Company vs. Ehrhardt, 244 Ill. 634.

Diamond Match Co. vs. Ontonagon presented the question of whether logs of the plaintiff cut in the forests of Michigan and floated down the Ontonagon River to a boom across the river in the village of Ontonagon and held there awaiting shipment to the mills of the plaintiff at Green Bay, in the state of Wisconsin, were taxable in Ontonagon. The claim was there made that the logs were in interstate transportation when they first started on their course down the river and from that time were in continuous transit and beyond the taxing power of the state. This court sustained the state court holding that the logs

were taxable, the opinion of the court being delivered by Mr. Justice McKenna.

In the case of *Bacon vs. Illinois*, 227 U. S. 504 at 515, Mr. Justice Hughes speaking for this court says: "The following facts are shown by the agreed statement: The grain had been shipped by the original owners who were residents of Southern and Western States, under contracts for its transportation to New York, Philadelphia and other eastern cities which reserved to the owners the right to remove it from the cars at Chicago 'for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination' thereof. While the grain was in transit it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of

changing its ownership, consignee or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property.

"But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been

inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. *Woodruff vs. Parham,* supra; *Brown vs. Houston,* supra; *Coe vs. Errol,* supra; *Pittsburgh & Southern Coal Co. vs. Bates,* 156 U. S. 577; *Diamond Match Co. vs. Ontonagon,* supra; *American Steel & Wire Co. vs. Speed,* supra; *General Oil Co. vs. Crain,* supra."

The court in this case further says: "In the present case the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State, his share of the expenses of the local government."

As to point II in the plaintiff's brief:

As a general proposition there is no controversy between counsel on this point, but we say that when general statements in findings of fact made by the lower court are opposed to specific

findings, as to what actually took place, made at the same time, the specific findings will control.

McCormick vs. National Surety Company, 134 Cal. 510.
Gebhard vs. Merchant, 84 Ark. 359.

And we further submit that the interpretation given to findings of fact of a lower court by the State Supreme Court are binding here. It was held in a recent case in this court that "the interpretation of a state law by the court of last resort of that state is binding upon the United States Supreme Court upon review." This follows a long list of cases to the same effect.

Anderson vs. Durr, Oct. term, 1921, page 18, advance sheets.

"A decision by a state court that certain tracts of land were not within the boundaries of a land grant rests upon a question of fact which can not serve as a basis of a writ of error from the federal Supreme Court to the state court."

Henry C. King, plaintiff in error, vs. State of West Virginia et als., 216 U. S. 92.

"The federal Supreme Court must accept the conclusions of a court below on a question of fact unless clearly and manifestly wrong."

Lawson vs. United States Mining Company, 207 U. S. 1.

As to point III in the plaintiff's brief:

We submit this proposition made by counsel for plaintiff is not well founded. The findings of fact referred to when read as a whole and in the light of the specific findings, as to what actually took place, clearly support the interpretation given to them by the Vermont Supreme Court, namely, that at the time of the assessment of the tax, April 1, 1919, the pulp wood "was then at rest in the boom at Brattleboro for a time necessarily indefinite and for a purpose *beneficial to the plaintiff.*" (Italics ours.) The plaintiff made preparations long in advance of starting the wood down West River and its tributaries to stop the wood in the "holding ground" at Brattleboro. It built and maintained a boom there, and as early as the middle of March, ten days before any of the wood started down the river, it "placed its boom across West River near its mouth and in the town of Brattleboro for the purpose of holding the wood in the West River until the water in the Connecticut had receded enough to allow the wood to be held on said river at plaintiff's said mill at Hinsdale." (Record, page 17, line 14.) For whose "convenience and benefit" was this boom at the mouth of West River built and maintained if not for the convenience and benefit of the plaintiff? And especially in view of the fact that it was not thought safe to let the wood flow into the Connecticut "as wood of the character of this wood could not be held by the Hinsdale boom and therefore the

plaintiff held its said wood in the boom at the mouth of the said West River in Brattleboro." (Record, page 17, line 24.)

Plaintiff's counsel, on page 11 and again on page 18, paragraph 2, of its brief, make statements in regard to the facts in the case of *Coe vs. Errol*. If these statements are deemed material we wish to call the court's attention to the exact language of the case on this subject. We quote from the agreed statement of facts shown on page 519 (*Coe vs. Errol*), paragraph 3: "And it is agreed that for many years the petitioner and his associates in the lumber business have cut large quantities of timber on their lands in Maine and floated them down the said lakes and rivers in Maine and down the Androscoggin River to the mills at said Lewiston; and timber thus cut has always lain over one season, being about a year, in the Androscoggin River, in this state, either in Errol, Dummer, or Milan; and the timber referred to in this petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom."

The court will observe that this statement refers to the wood cut in Maine and not to the wood cut in New Hampshire.

As to point IV in the plaintiff's brief:

This question is not at issue here.

As to point V in the plaintiff's brief:

We say the judgment of the Supreme Court of the state of Vermont should *not* be reversed.

SUGGESTIONS.

1. The plaintiff apparently loses sight of the distinction between the cases where property is delivered to a common carrier for transportation out of the state and the cases where property, as in this case, is being transported by the owner and is at all times under its control.

2. The plaintiff had the privilege of continuing the transportation, but of this it might avail itself or not as it chose. It might sell the wood in Vermont or forward it, as it saw fit. It was in its possession with the control of absolute ownership. It may have intended, at an indefinite time, to forward the wood to its rossing mill in Hinsdale, N. H., but this intention, while the wood remained in the boom at Brattleboro and before it had been started from the boom on its final journey, did not make it immune from local taxation.

3. In "an action to recover money paid as a tax the burden is upon the plaintiff to show that the tax was illegally assessed; or, to be specific, to establish the interstate character of the transportation."

4. The plaintiff had established a "holding ground" by building and maintaining a boom at the mouth of West River for its own benefit, and

while, through its employment, the wood was there at rest, there was no reason why it should not be included with its other property within the state in an assessment for taxation which was made in the usual way, without discrimination.

Respectfully submitted,

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Attorneys for Respondent.

Decree affirmed.

CHAMPLAIN REALTY COMPANY *v.* TOWN OF BRATTLEBORO.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 128. Argued November 27, 28, 1922.—Decided December 11, 1922.

Logs, under control of their owner, which are being floated in a river in continuous movement from one State to another, or which, in the course of their interstate journey, are being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, are in interstate commerce and not subject to state taxation. P. 371. *Coe* v. *Errol*, 116 U. S. 517, and other cases, distinguished.

113 Atl. 806, reversed.

This was a suit in assumpsit by the petitioner, the Champlain Realty Company, to recover $484.50 and interest, from the Town of Brattleboro, Vermont, being the amount of taxes levied on logs of pulp wood of the petitioner floating in the West River in that town on April 1, 1919, and paid by the petitioner under protest as illegally collected because the logs were then in transit in interstate commerce to Hinsdale, New Hampshire. The suit

was brought in the County Court, and the defendant having failed to set the cause for jury trial within the time fixed by statute, it was heard by the court, which made findings of fact that under the state practice are conclusive on review by the Supreme Court. The County Court gave judgment for the Realty Company. The Town took the case on exceptions to the Supreme Court.

The Supreme Court summarized the findings of fact by the County Court as follows:

"During the winter of 1918–19, the plaintiff cut pulp wood, in all about 10,000 cords, in the towns of Jamaica, Stratton, Londonderry, and Winhall in this State. The plaintiff maintains a mill at Hinsdale, in the State of New Hampshire, about three miles below Brattleboro, where its pulp wood is rossed and bolted. The wood, cut four feet long, was placed upon the banks of West River and its tributaries to be floated down into the Connecticut and thence to its destination at the mill in Hinsdale. The waters of the West River are wholly in this State and empty in the town of Brattleboro into the Connecticut. West River and its tributaries had been used for driving pulp wood to the mill at Hinsdale in the years 1917 and 1918. A single log boom is provided at the mill to receive the wood floated down the river, but is incapable of holding it all when the water in the Connecticut is high and the current swift, and the wood is liable to be carried over and drawn under the boom and lost. A pond of considerable size is formed near the mouth of West River in the town of Brattleboro by water set back from the Connecticut by the dam at Vernon. Plaintiff maintains a boom at this point to hold and control the logs driven down West River until the water in the Connecticut has receded sufficiently to permit of their being held in the boom at Hinsdale.

"On March 25, 1919, the plaintiff began putting the pulp wood into the West River and its tributaries, the

water in these streams then being high, intending to drive it down the river and thence into the Connecticut and down that river to its mill in Hinsdale. In anticipation of the probable high water in the Connecticut, plaintiff had previously placed its boom across West River near its mouth to hold the wood there until the water in the Connecticut had receded enough to allow it to be held at the mill at Hinsdale. The wood floated down West River on the high water, and at the head of the drive reached the boom at the mouth of West River on March 27, 1919. At that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood into that river, as it could not be held at the Hinsdale boom. For this reason and no other the plaintiff held its wood in the boom at Brattleboro. The Connecticut was not suitable for driving pulp wood from the time the drive began until April 3d, on which date the plaintiff's servants cut the boom at the mouth of West River so that the wood could pass into the Connecticut. Prior to April 3d, only about 4,000 cords of the wood had reached and been held at the West River boom. The balance arriving later went through to Hinsdale without stopping. On March 28, 1919, when there was by estimation about 4,000 cords of wood in the West River boom, it broke, allowing some of the wood to escape into the Connecticut and onto the Retreat meadow in Brattleboro near the mouth of West River. The boom was repaired on March 29, 1919. At this time the part of West River where the wood lay back of the boom, called the holding ground, was frozen, so the wood, if not boomed, could not have continued on its journey into the Connecticut at that time. On April 1, 1919, about 1,500 cords of the pulp wood was being held in plaintiff's boom at the mouth of West River. Some wood that was lodged on an island and the wood on the Retreat meadow remained after the boom was cut. The latter remained on the meadow about two weeks and had

to be taken out by a process called 'booming' or 'warping.' None of this 1,500 cords was cut in the town of Brattleboro. All of it had been carried down West River and was destined for the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut. The drive of pulp wood down West River to the Connecticut and thence to the crossing plant at Hinsdale was in continuous operation from March 25th until it was completed on May 9th, and was conducted properly to make an uninterrupted passage, so far as possible."

On these findings the Supreme Court held that the interstate transit did not begin until the wood left the Brattleboro boom. Everything before that was merely preparations. The floating of the logs from the West River towns to Hinsdale was interrupted, and the interruption, although only long enough to secure safety in the drive, was for the benefit of the owner and in law postponed the initial step in the interstate transit until the wood was released from the Brattleboro boom. The court, therefore, held the wood taxable at Brattleboro and reversed the County Court.

Mr. William C. Cannon and *Mr. Melville P. Maurice*, with whom *Mr. Theodore W. Morris Jr.*, was on the briefs, for petitioner.

Mr. Arthur P. Carpenter and *Mr. Ernest W. Gibson* for respondent.

The facts clearly establish that the immediate destination of the wood, when it was started from the forest, was the pond behind the boom at the mouth of West River in Brattleboro. The wood was cut in the various towns in the West River Valley, and floated down the tributaries of West River, and that river itself, until it was gathered together in that safe haven, the pond, caused by the setback of the water of the Connecticut, behind the plaintiff's boom, called the "holding ground." The petitioner's

intention to float the wood, at some indefinite time, to its rossing mill at Hinsdale, is wholly immaterial. *Coe* v. *Errol*, 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Bacon* v. *Illinois*, 227 U. S. 504; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665; *Burlington Lumber Co.* v. *Willetts*, 118 Ill. 559; *Prairie Oil & Gas Co.* v. *Ehrhardt*, 244 Ill. 634.

When general statements in findings of fact made by the lower court are opposed to specific findings, as to what actually took place, made at the same time, the specific findings will control. *McCormick* v. *National Surety Co.*, 134 Cal. 510; *Gebhard* v. *Merchant*, 84 Ark. 359.

The interpretation given to findings of fact of a lower court by the State Supreme Court is binding here.

The findings of fact referred to when read as a whole and in the light of the specific findings, as to what actually took place, clearly support the interpretation given to them by the Vermont Supreme Court, namely, that at the time of the assessment of the tax, April 1, 1919, the pulp wood "was then at rest in the boom at Brattleboro for a time necessarily indefinite and for a purpose beneficial to the plaintiff." The plaintiff made preparations long in advance of starting the wood down West River and its tributaries to stop the wood in the "holding ground" at Brattleboro. It built and maintained a boom there, and as early as the middle of March, ten days before any of the wood started down the river, it "placed its boom across West River near its mouth and in the town of Brattleboro for the purpose of holding the wood in the West River until the water in the Connecticut had receded enough to allow the wood to be held on said river at plaintiff's said mill at Hinsdale." For whose "convenience and benefit" was this boom at the mouth of West River built and maintained if not for the convenience and benefit of the plaintiff?

The plaintiff apparently loses sight of the distinction between the cases where property is delivered to a common carrier for transportation out of the State and the cases where property, as in this case, is being transported by the owner and is at all times under its control.

The plaintiff had the privilege of continuing the transportation, but of this it might avail itself or not as it chose. It might sell the wood in Vermont or forward it, as it saw fit. It was in its possession with the control of absolute ownership. It may have intended, at an indefinite time, to forward the wood to its rossing mill in Hinsdale, N. H., but this intention, while the wood remained in the boom at Brattleboro and before it had been started from the boom on its final journey, did not make it immune from local taxation.

In an action to recover money paid as a tax the burden is upon the plaintiff to show that the tax was illegally assessed; or, to be specific, to establish the interstate character of the transportation.

Mr. Chief Justice Taft, after stating the case, delivered the opinion of the Court.

The Vermont Supreme Court depended for its conclusions chiefly upon *Coe* v. *Errol*, 116 U. S. 517, which is the leading case on this subject. There logs had been cut on Wentworth's Location in New Hampshire during the winter, and had been drawn down to Errol in the same State, and placed in Clear Stream and on the banks thereof on lands of John Akers and part on land of George C. Demerritt in said town, to be from thence floated down the Androscoggin River to the State of Maine (p. 518).

It is not clear how long they had lain there, but certainly for part of one winter season. This Court, speaking by Mr. Justice Bradley, sought to fix the time when

such logs, in the course of their being taken from New Hampshire to Maine, ceased to be part of the mass of property of New Hampshire and passed into the immunity from state taxation as things actually in interstate commerce. The learned Justice states the rule to be "that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (P. 527.)

Again, on page 528, Justice Bradley said: "The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of

Maine. They had only been drawn down from Wentworth's Location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination." (P. 528.)

The question here then is, Where did the interstate shipment begin? When the wood was placed in the waters of the West River in the towns of Jamaica, Stratton, Londonderry and Winhall, or at the boom in Brattleboro? The whole drive was ten thousand cords. Six thousand cords of that, shipped from these towns after the third of April, went through directly to Hinsdale, New Hampshire, without stopping. Certainly that was a continuous passage and the wood when floating in the West River was as much in interstate commerce as when on the Connecticut. Why was it any more in interstate commerce than that which had been shipped before April 3rd from the same towns for the same destination by the same natural carrying agency, to wit, the flowing water of the West and Connecticut Rivers? Did the fact that before April 3rd the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West River, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West River where the wood had been put in the stream. The boom at the mouth of the West River did not constitute an entrepot or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classified, measured, counted

or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey that but for natural causes, over which he could exercise no control, would have been actually continuous. This was not the case in *Coe* v. *Errol*. It is evident from the statement of that case, and Mr. Justice Bradley's language, that the logs were partly drawn and partly floated to Errol and deposited some in the stream and some on the banks, where "they were to remain until it should be convenient to send them to their destination," and they were being gathered there for the whole previous winter season. It was an entrepot or depot as the Justice several times describes it. The mere fact that the owner intended to send them out of the State under such circumstances did not put them into transit in interstate commerce. But here, we have the intention put into accomplishment by launching, and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose.

The case at bar is easily distinguishable from the other cases cited by the Vermont Supreme Court. In *Bacon* v. *Illinois*, 227 U. S. 504, Bacon had bought shipments of grain *in transitu* from Western States to New York in the contract for which the carriers had given the shipper the right to remove it "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination." On arrival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator. This removal was for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee or destination. It was held that whatever his intention, the grain was at rest within his complete power of disposition and held for his

own benefit and was taxable. His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey. It was to enable him to treat the grain so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the State.

So, in *General Oil Co.* v. *Crain*, 209 U. S. 211, the Oil Company had its principal place of business in Memphis, Tennessee, for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other States and put it into a tank, appropriately marked for distribution in smaller vessels to fill orders for oil already sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The Court continued: "It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation." (P. 231.) The tank at Memphis thus became a depot in its oil business for preparing the oil for another interstate journey. So far as it bears upon this case, *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, presented a similar state of facts and ruling.

In *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, the company cut one hundred and eighty million feet of timber for the purpose of saving the same from fire and to protect and preserve it put it into the Ontonagon River, Michigan. It was drawn down to the mouth of the river into the township of Ontonagon, Michigan, to the sorting ground and pier jams of the company, and there it was taxed. The logs remained there and were

shipped as they were needed to Green Bay, Wisconsin, to the mills of the company. Not more than forty million feet a season were needed. Palpably the company's sorting grounds and pier jams were a depot for the keeping of the logs for the business purposes of the company and there was no interstate commerce until the final shipment to Green Bay began.

In the cases of *Brown* v. *Houston*, 114 U. S. 622, and *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577, the coal in barges in the Mississippi River which was the subject of taxation had come to rest in Louisiana, after a trip from Pittsburg, and was being held for sale to anyone who might wish to buy.

The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State* v. *Engle*, 34 N. J. L. 425; *State* v. *Carrigan*, 39 N. J. L. 35. This was the case in *Kelley* v. *Rhoads*, 188 U. S. 1, in which sheep, driven 500 miles from Utah to Nebraska, which travelled nine miles a day, were held immune from taxation in Wyoming where they stopped and grazed on their way. Another instance is as to that part of the logs in *Coe* v. *Errol*, which were not before this Court because the Supreme Court of New Hampshire had found them nontaxable in New Hampshire. They were cut in Maine and were floated down the Androscoggin on their way to Lewiston, Maine, but were delayed for a season at Errol,

New Hampshire, because of low water. In the cases just cited the transit had begun in one State and was continued through another on the way to a third. This circumstance strengthened the inference that the interruption in the intermediate State did not destroy interstate continuity of the trip. But this is not always so, as *Bacon* v. *Illinois* and *General Oil Co.* v. *Crain* show. In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

Of all the cases in this Court where such movable property has been held taxable, none is nearer in its facts than *Coe* v. *Errol* to the case at bar. We have pointed out the distinction between the two which requires a different conclusion here.

Reversed and remanded for further proceedings not inconsistent with this opinion.